REPORT OF INVESTIGATION

UNITED STATES SECURITIES AND EXCHANGE COMMISSION
OFFICE OF INSPECTOR GENERAL

Case No. OIG-567

Destruction of Records Related to Matters Under Inquiry and Incomplete Statements to the National Archives and Records Administration Regarding that Destruction by the Division of Enforcement

October 5, 2011

OIG-567 Redaction Key

All redactions have been made pursuant to FOIA Exemptions (b)(6) & (b)(7)(C).

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INTRODUCTION AND SUMMARY OF RESULTS

On June 15, 2011, the Securities and Exchange Commission ("SEC" or "Commission") Office of Inspector General ("OIG") opened an investigation into allegations made in a letter of the same date from Gary Aguirre,[1] counsel for Darcy Flynn, a senior counsel in the SEC Division of Enforcement ("Enforcement"), to Chairman Mary Schapiro. The letter alleged that Enforcement has improperly destroyed records relating to Matters Under Inquiry ("MUIs") over the past two decades, and that the SEC made misleading statements in an August 27, 2010 response to a July 29, 2010 letter from the National Archives and Records Administration ("NARA") concerning the SEC's potential unauthorized destruction of MUI records.[2] On September 6, 2011, Flynn and his attorney raised new allegations that the SEC does not have authority to destroy

[1] Aguirre is a former Enforcement staff attorney who was fired by the SEC on September 1, 2005. At the time of his firing, Aguirre was the principal staff attorney assigned to an investigation of Pequot Capital Management ("Pequot"). Enforcement's conduct of that Pequot investigation and the circumstances of Aguirre's firing were the subjects of a Senate Finance and Judiciary Committees hearing and an OIG Report. *See* September 30, 2008 Report of Investigation: Case No. OIG-431, *Reinvestigation of Claims by Gary Aguirre of Preferential Treatment and Improper Termination*; August 2007 Senate Committees on Finance and on the Judiciary, "The Firing of an SEC Attorney and the Investigation of Pequot Capital Management." Aguirre subsequently alleged that his termination was a result of his aggressive investigation of Pequot and filed a wrongful termination lawsuit. The SEC agreed to pay Aguirre $755,000 in settlement of his wrongful termination lawsuit.

[2] This investigation was originally opened as OIG-564, to investigate the above allegations as well as other allegations from Flynn's counsel that in PII PII PII. The OIG anticipates that it will shortly issue a Report of Investigation for OIG-564 addressing these allegations concerning the former Director of Enforcement.

three categories of documents that are currently not scheduled: (1) documents produced by third parties; (2) internal work product; and (3) internal e-mails.[3]

The OIG investigation found that for at least 30 years, Enforcement has opened MUIs as "pre-investigation inquiries." MUIs are distinct from formal investigations in Enforcement and are "opened to collect and analyze information to determine whether an enforcement investigation should be instituted." The OIG investigation found that it had been the policy of Enforcement, from the point of time in which MUIs were first created in approximately 1981 until July 20, 2010, to dispose of all documents relating to a MUI that were closed without becoming investigations. According to Enforcement, between October 1, 1992 and July 20, 2010, Enforcement opened 23,289 MUIs. Of those 23,289 MUIs, 10,468 MUIs were closed without becoming an investigation or another MUI.

The OIG investigation found Enforcement's case closing manual, which has been posted on Enforcement's Intranet since at least 2001, specifically directed Enforcement attorneys, "After you have closed a MUI that has not become an investigation, you should dispose of any documents obtained in connection with the MUI." The OIG did not find evidence of an improper motive behind Enforcement's longstanding policy of destroying documents related to closed MUIs that did not become investigations, although there was a lack of clarity as to the rationale for the policy.

The OIG investigation also found that the SEC's Enforcement staff destroyed documents related to closed MUIs that should have been preserved as federal records. These documents included anonymous correspondence and complaints, correspondence from the SEC requesting documents from companies in the course of a MUI, and correspondence to accompany companies' document production responses. However, notwithstanding these instances of record destruction in connection with MUIs that were closed without becoming investigations, the OIG is not aware of a particular investigation that was hampered by the destruction of records for a MUI, although the OIG has not conducted an exhaustive audit or review of the potential impact on Enforcement investigations of the destruction of MUI documents over the years.

The OIG investigation also found that after SEC Enforcement attorney Darcy Flynn informed NARA in June 2010 that the SEC had been destroying records relating to MUIs for years, NARA sent a letter to the SEC on July 29, 2010 asking the SEC to look into the apparent unauthorized disposal of Federal records. However, we found that in the process of drafting a response to NARA, the SEC made no inquiries designed to determine whether MUI records were in fact destroyed. Instead, Enforcement declared in

[3] On September 27, 2011, Citizens for Responsibility and Ethics in Washington filed a civil complaint in the United States District Court for the District of Columbia against the SEC and Chairman Mary Schapiro. Complaint for Declaratory, Injunctive, and Mandamus Relief, attached as Exhibit 1. The complaint requested that the court declare that the SEC's document destruction policy violates Federal law and that the court order the SEC and Chairman Schapiro "to develop and implement an effective records management system" and to "initiate action through the attorney general and internally to recover destroyed investigative files and prevent the further destruction of those files . . . ." *Id*. at 19-20.

a letter dated August 27, 2010 that it was "not aware of any specific instances of the destruction of records from any [MUIs that were closed without a subsequent formal investigation], but we cannot say with certainty that no such documents have been destroyed over the past seventeen years."

We found that the SEC's August 27, 2010 response to NARA did not comply with federal regulations as it did not provide "a complete description of the records with volume and dates if known" and "a statement of the exact circumstances surrounding the removal, defacing, alteration or destruction of records" as required by 36 C.F.R. § 1230.14(a). In addition, we found that the SEC's response to NARA omitted information important to understanding the scope and nature of the issue relating to the destruction of MUI records. Most significantly, the SEC's response omitted the fact that it had been Enforcement's policy to destroy all documents upon closing a MUI. Moreover, despite the statement in the SEC's August 27, 2010 response letter that "the Division is not aware of any specific instances of the destruction of records from any other MUI (i.e., a MUI that was closed without a subsequent formal investigation), but we cannot say with certainty that no such documents have been destroyed over the past seventeen years," we found that the Division of Enforcement was aware of at least one specific instance of the destruction of records from a MUI that was closed without a subsequent formal investigation.

The OIG investigation also found that, although Enforcement has destroyed, pursuant to long-time policy, three categories of documents that are currently not scheduled (documents produced by third parties, internal work product, and internal e-mails), the SEC's SEC1 [redacted] has opined that these documents were not records that were required to be retained. Although it does not appear that these three categories of documents have been improperly destroyed without authority to do so, the OIG is recommending that the SEC seek formal guidance from NARA to ensure that these documents are disposed in accordance with Federal law.

While the OIG did not find evidence that the individuals who were responsible for preparing the response to NARA intentionally made materially false statements in that response, we did find that certain senior Enforcement officials, in light of the information that was available to them at the time, should have drafted a response to NARA that was more forthcoming. Accordingly, we are referring this matter to the Director of Enforcement, for oral instruction or counseling of those individuals on the importance of providing full and complete responses to official requests from federal agencies like NARA.

We are also recommending that the Division of Enforcement: (1) take appropriate steps as necessary, including coordination with Enforcement attorneys nationwide, to determine what federal records from closed MUIs are retrievable, and ensure that any such federal records are retained in the same manner that investigative records are retained pursuant to the current schedule with NARA; (2) work with the SEC's Office of Records Management Services and NARA to determine which MUI and

investigative records are legally required to be retained; (3) determine if there are additional federal records that, while not legally required to be retained, should be retained as a matter of Enforcement program policy, to enable the Enforcement staff to understand what investigative work has been done in closed MUIs and investigations, or for other policy reasons; and (4) review its guidance, including as it relates to automatically generated e-mails, to ensure that all guidance is consistent with Enforcement's federal record retention legal obligations.

SCOPE OF THE OIG INVESTIGATION

I. Review of E-mails

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 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 ten current or former SEC employees. These included: six current or former employees of the Division of Enforcement; three current employees of the Office of FOIA, Records Management, and Security; and one current employee of the Office of the Chief Operating Officer. The OIG estimates that it obtained and searched over 500,000 e-mails during the course of its investigation.

II. Document Requests and Review of Records

The OIG made several requests to the Division of Enforcement for documents relating to MUI policies and procedures, as well as data relating to MUIs that were closed without becoming investigations. The OIG also made several requests to the Office of Records Management Services relating to SEC records management policy. The OIG made requests to Enforcement attorneys for information and documents pertaining to over a dozen particular MUIs. The OIG also sought and received a written opinion from NARA on several issues relating to MUI documents and the SEC's August 27, 2010 letter to NARA, and has been in communication with NARA officials on an ongoing basis during the course of the investigation.

We carefully reviewed and analyzed the information received as a result of our document production requests. In addition, the OIG reviewed HUB Case Reports and Name Relationship Search Index ("NRSI")[4] Reports for over a dozen particular

[4] The HUB is Enforcement's electronic case management and tracking system. NRSI is used by the Enforcement staff to research whether a person or entity has been the subject or a related party to any closed or open MUIs or investigations.

Enforcement MUIs. The OIG also reviewed handwritten notes taken by an Enforcement staff attorney at various meetings and handwritten meeting notes taken by the SEC SEC1

III. Testimony and Interviews

The OIG took the sworn testimony of eleven witnesses and interviewed thirteen individuals with relevant expertise and/or knowledge of facts and circumstances pertinent to the investigation.

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

1. Darcy Flynn, Senior Counsel, Division of Enforcement, Securities and Exchange Commission; taken on July 8, 2011 ("Flynn Testimony Tr."). Excerpts of testimony transcript are attached as Exhibit 2.

2. SEC1 SEC1 SEC1, Office of Records Management Services, Securities and Exchange Commission; taken on July 26, 2011 ("SEC1 Testimony Tr."). Excerpts of testimony transcript are attached as Exhibit 3.

3. Barry Walters, Director, Office of FOIA, Records Management, and Security, Securities and Exchange Commission; taken on July 27, 2011 ("Walters Testimony Tr."). Excerpts of testimony transcript are attached as Exhibit 4.

4. ENF10 ENF10 ENF10 Division of Enforcement, Securities and Exchange Commission; taken on August 2, 2011 ("ENF10 Testimony Tr."). Excerpts of testimony transcript are attached as Exhibit 5.

5. ENF4 ENF4 Attorney, Division of Enforcement, Securities and Exchange Commission; taken on August 5, 2011 ("ENF4 Testimony Tr."). Excerpts of testimony transcript are attached as Exhibit 6.

6. SEC3 SEC3 SEC3, Office of Records Management Services, Securities and Exchange Commission; taken on August 10, 2011 ("SEC3 Testimony Tr."). Excerpts of testimony transcript are attached as Exhibit 7.

7. Jeffery Heslop, Chief Operating Officer, Securities and Exchange Commission; taken on August 10, 2011 ("Heslop Testimony Tr."). Excerpts of testimony transcript are attached as Exhibit 8.

8. SEC2 SEC2 SEC2, Division of Enforcement, Securities and Exchange Commission; taken on August 17, 2011 ("SEC2 Testimony Tr."). Excerpts of testimony transcript are attached as Exhibit 9.

9. [redacted] Senior Counsel, Division of Enforcement, Securities and Exchange Commission; taken on August 29, 2011 ("[redacted] Testimony Tr."). Excerpts of testimony transcript are attached as Exhibit 10.

10. Adam Storch, Managing Executive, Division of Enforcement, Securities and Exchange Commission; taken on September 1, 2011 ("Storch Testimony Tr."). Excerpts of testimony transcript are attached as Exhibit 11.

11. Joan McKown, former Chief Counsel, Division of Enforcement, Securities and Exchange Commission; taken on September 1, 2011 ("McKown Testimony Tr."). Excerpts of testimony transcript are attached as Exhibit 12.

The OIG also conducted interviews of the following thirteen individuals:

1. [redacted], National Archives and Records Administration; conducted on July 28, 2011 ("[redacted] Interview Memorandum"). Memorandum of Interview is attached as Exhibit 13.

2. [redacted] Attorney, Division of Enforcement, Securities and Exchange Commission; conducted on August 31, 2011 ("[redacted] Interview Memorandum"). Memorandum of Interview is attached as Exhibit 14.

3. [redacted] Attorney, Enforcement, New York Regional Office, Securities and Exchange Commission; conducted on August 31, 2011 ("[redacted] Interview Memorandum"). Memorandum of Interview is attached as Exhibit 15.

4. [redacted] Senior Counsel, Division of Enforcement, Securities and Exchange Commission; conducted on August 31, 2011 ("[redacted] Interview Memorandum"). Memorandum of Interview is attached as Exhibit 16.

5. [redacted] Attorney, Division of Enforcement, Securities and Exchange Commission; conducted on August 31, 2011 ("[redacted] Interview Memorandum"). Memorandum of Interview is attached as Exhibit 17.

6. Andrew Calamari, Associate Regional Director, Enforcement, New York Regional Office, Securities and Exchange Commission; conducted on August 31, 2011 ("Calamari Interview Memorandum"). Memorandum of Interview is attached as Exhibit 18.

7. [redacted], Enforcement, San Francisco Regional Office, Securities and Exchange Commission; conducted on August 31, 2011 and September 1, 2011 ("[redacted] Interview Memorandum"). Memorandum of Interviews is attached as Exhibit 19.

8. ENF7 ENF7 Supervisory Attorney, Enforcement, New York Regional Office, Securities and Exchange Commission; conducted on September 1, 2011 ("ENF7 Interview Memorandum"). Memorandum of Interview is attached as Exhibit 20.

9. Michael Dicke, Assistant Regional Director, Enforcement, San Francisco Regional Office, Securities and Exchange Commission; conducted on September 1, 2011 ("Dicke Interview Memorandum"). Memorandum of Interview is attached as Exhibit 21.

10. Darcy Flynn, Senior Counsel, Division of Enforcement, Securities and Exchange Commission; conducted on September 1, 2011 ("Flynn Interview Memorandum"). Memorandum of Interview is attached as Exhibit 22.

11. ENF8 ENF8 former Attorney, Division of Enforcement, Securities and Exchange Commission; conducted on September 2, 2011 ("ENF8 Interview Memorandum"). Memorandum of Interview is attached as Exhibit 23.

12. SEC1 SEC1 SEC1 Office of Records Management Services, Securities and Exchange Commission; conducted on September 9, 2011, and September 22, 2011 ("SEC1 Interview Memorandum"). Memorandum of Interviews is attached as Exhibit 24.

13. SEC4 SEC4 SEC4 Securities and Exchange Commission; conducted on September 19, 2011 ("SEC4 Interview Memorandum"). Memorandum of Interview is attached as Exhibit 25.

RELEVANT STATUTES, RULES AND REGULATIONS

Federal Statutes

18 U.S.C. § 2071

(a) Whoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, with intent to do so takes and carries away any record, proceeding, map, book, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States, shall be fined under this title or imprisoned not more than three years, or both.

(b) Whoever, having the custody of any such record, proceeding, map, book, document, paper, or other thing, willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys the same, shall be fined under this title or imprisoned not more than three years, or both; and shall forfeit his office and be disqualified from holding any office under the United States. As used in this subsection, the term "office"

does not include the office held by any person as a retired officer of the Armed Forces of the United States.

44 U.S.C. § 3101

The head of each Federal agency shall make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities.

44 U.S.C. § 3106

The head of each Federal agency shall notify the Archivist of any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency of which he is the head that shall come to his attention, and with the assistance of the Archivist shall initiate action through the Attorney General for the recovery of records he knows or has reason to believe have been unlawfully removed from his agency . . . .

18 U.S.C. § 1001

Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully –

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years . . . .

Code of Federal Regulations

36 C.F.R. § 1230.3

. . . *Unlawful or accidental destruction (also called unauthorized destruction*) means disposal of an unscheduled or permanent record; disposal prior to the end of the NARA-approved retention period of a temporary record (other than court-ordered disposal . . .); and disposal of a record subject to a FOIA request, litigation hold, or any other hold requirement to retain the records.

36 C.F.R. § 1230.10

The heads of Federal Agencies must:

> (a) Prevent the unlawful or accidental removal, defacing, alteration, or destruction of records . . . . Records must not be destroyed except under the provisions of NARA-approved agency records schedules or the General Records Schedules issued by NARA;
>
> (b) Take adequate measures to inform all employees and contractors of the provisions of the law relating to unauthorized destruction, removal, alteration or defacement of records;
>
> (c) Implement and disseminate policies and procedures to ensure that records are protected against unlawful or accidental removal, defacing, alteration and destruction; and
>
> (d) Direct that any unauthorized removal, defacing, alteration or destruction be reported to NARA.

36 C.F.R. § 1230.12

The penalties for the unlawful or accidental removal, defacing, alteration, or destruction of Federal records or the attempt to do so, include a fine, imprisonment, or both (18 U.S.C. 641 and 2071).

36 C.F.R. § 1230.14

The agency must report promptly any unlawful or accidental removal, defacing, alteration, or destruction of records in the custody of that agency to [NARA].

(a) The report must include:

> (1) A complete description of the records with volume and dates if known;
>
> (2) The office maintaining the records;
>
> (3) A statement of the exact circumstances surrounding the removal, defacing, alteration, or destruction of records;
>
> (4) A statement of the safeguards established to prevent further loss of documentation; and
>
> (5) When appropriate, details of the actions taken to salvage, retrieve, or reconstruct the records.

(b) The report must be submitted or approved by the individual authorized to sign records schedules . . . .

Commission Conduct Regulation

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:

> (a) The Securities and Exchange Commission has been entrusted by Congress with the protection of the public interest in a highly significant area of our national economy. In view of the effect which Commission action frequently has on the general public, *it is important that members, employees and special Government employees maintain unusually high standards of honesty, integrity, impartiality and conduct.* They must be constantly aware of the need to avoid situations which might result either in actual or apparent misconduct or conflicts of interest and to conduct themselves in their official relationships in a manner which commands the respect and confidence of their fellow citizens.
>
> (b) For these reasons, members, employees and special Government employees should at all times abide by the standards of ethical conduct for employees of the executive branch (codified in 5 CFR part 2635); the supplemental standards of ethical conduct for members and employees of the Securities and Exchange Commission (codified in 5 CFR part 4401); the standards of conduct set forth in this subpart; the Canons of ethics for members of the Securities and Exchange Commission (codified in subpart C of this part 200); and, in the case of a person practicing a profession as defined in 5 CFR 1636.305(b)(1), the applicable professional ethical standards.

17 C.F.R. § 200.735-2 (emphasis added).

RESULTS OF THE INVESTIGATION

I. Until July 2010, the SEC's Policy was to Destroy its MUI Files Upon Closure

A. Enforcement's Distinction Between MUIs and Investigations

For at least 30 years, Enforcement has opened MUIs as "pre-investigation inquiries." March 16, 1998 Memorandum from William McLucas, then the Director of Enforcement, to All Professional Enforcement Staff (the "1998 McLucas Memorandum"), attached as Exhibit 26; June 29, 2001 Case Closing Memorandum, attached as Exhibit 27; *see also* ENF4 Testimony Tr. at 9-10, 69. MUIs are distinct from investigations in the SEC's Division of Enforcement. ENF4 ENF4 an attorney in Enforcement's ENF4 s in Enforcement, testified that, in 1981, the SEC created the electronic MUI system, "in which staff entered an indicator that they were looking at something." ENF4 Testimony Tr. at 9-10, 69.

ENF8 ENF8 an attorney at the SEC from ENF8 in various offices including Enforcement's Office of Chief Counsel, stated in an interview with OIG that the MUI system was created as an "early-warning" notification so that an attorney considering opening a MUI would be able to see that there was already one opened for the same matter, and there would not be duplicated work. ENF8 ENF8 Interview Memorandum. ENF8 stated to the OIG that MUIs were never intended to replace investigations, but to be "quick hits." *Id.*

The 1998 McLucas Memorandum stated:

> A Matter Under Inquiry (MUI) is opened to collect and analyze information to determine whether an enforcement investigation should be instituted. It is important to open a MUI as soon as possible to provide notice to the rest of the Division and the Commission (through the NRSI system) that an inquiry is being conducted.

Exhibit 26 at 1. The memorandum further stated:

> A MUI is not a substitute for an investigation. A MUI is intended as simply a quick look at readily available information, in order to determine whether an investigation should be opened. An investigation is to be opened at any point we determine to investigate potential securities laws violations, *whether or not* a formal order has been issued.

> A major reason for tracking MUI's in the computerized MUI system is to provide other offices with notice as soon as possible that the matter is under consideration for possible investigation. MUI files are not stored as official files of the Commission. Testimony should be taken only after an investigation has been opened.
>
> Because a MUI is merely a pre-investigation inquiry, it has a short life. . . . A MUI should be terminated after 80 hours [of work has been performed by the staff in connection with the MUI] or, at the outside, after it has been opened for two months. Please review all of your outstanding MUI's, and either close them or convert them to investigations where appropriate.

Id. (emphasis in original); *see also* Exhibit 27, June 29, 2001 Case Closing Memorandum ("Because a MUI is merely a pre-investigation inquiry, it has a short life. A MUI should be terminated after 80 hours [of work have been performed by the staff in connection with the MUI], or, at the outside, after it has been opened for two months.").

In 2003, Enforcement changed its case tracking computer system so that any MUI that had been open for over 60 days would automatically become an investigation in the case tracking computer system. December 11, 2002 E-mail from Joan McKown to all Enforcement staff, attached as Exhibit 28. In a December 11, 2002 e-mail to all Enforcement staff explaining this automatic conversion from MUI to investigation after 60 days, Joan McKown, then the Division of Enforcement's Chief Counsel, wrote:

> You will probably want to make it a practice to review open MUIs and close them out or open them into investigations prior to the 60 day limit, and you will definitely want to do this prior to January, since there are a large number of aged open MUIs; it is much easier to close a MUI than to close an investigation.

Id. at 2. The current version of the SEC's Enforcement Manual states: "While a MUI can be opened on the basis of very limited information, an investigation should be opened after the assigned staff has done some additional information-gathering and analysis." Excerpt from August 2, 2011 Enforcement Manual Section 2.3.2, attached as Exhibit 29.

Officials in Enforcement's Office of the Chief Counsel expressed an understanding of MUIs similar to this written guidance cited above. ENF10 ENF10 the ENF10 testified that a MUI is "an informal investigation where we are looking at something that might be a violation of the federal securities laws, but it hadn't reached the point where we feel the need, for a number of reasons, to seek a formal order." ENF10 Testimony Tr. at 9-11.

Joan McKown, the chief counsel for Enforcement from November 1993 through July 2010, testified that a MUI is "something that has come into the office. It's come to the attention of the Enforcement staff. They haven't decided whether to open an investigation yet, and they are taking a brief look at the matter." McKown Testimony Tr. at 7.

An Enforcement staff attorney who has worked in the division since 1999 testified:

> When it comes to MUIs, the way they've been treated has changed over time . . . . [A]t one point in time years and years ago, you did not have to convert a MUI to [an investigation and] could keep [the MUI] open for years and obtain all of these categories [of records identified in a 1993 Enforcement-wide memorandum discussed in Section I.B. below] except for the litigation category . . . .
>
> Then it changed at some point where a MUI could only be open for 60 days, and then . . . it would automatically convert to a case . . . . [T]he whole point in having the 60 days was so that you could make a quick judgment and move on to cases that deserved attention and just, you know, get rid of the matters under inquiry that did not deserve attention.

ENF6 ENF6 Testimony Tr. at 26.

B. The SEC's Long-Standing Policy Has Been to Preserve Certain Documents Related to its Investigations

On May 29, 1989, Gary Lynch, then the SEC's Director of the Division of Enforcement, issued a memorandum to all Enforcement personnel titled "Disposition of Records Upon the Closing of Cases," setting forth "policies and procedures for the disposition of records at the time a case is closed." May 29, 1989 Memorandum from Gary Lynch to All Enforcement Personnel (the "1989 Lynch Memorandum"), attached as Exhibit 30. The 1989 Lynch Memorandum stated:

> After a case has been closed, the Commission has no interest in permanently retaining records other than those described . . . as Categories A – E. Accordingly, promptly after a case is closed, the staff should either discard all other documents or, upon written request, return them to the party that submitted them to the Commission.

Id.

The 1989 Lynch Memorandum then described the five A – E categories of records that should be retained upon closing a "case":

> (A) Transcripts of testimony taken in an investigation and the exhibits to such testimony;
>
> (B) The Commission's official file . . . which should include the case opening form, formal orders of investigation, Privacy Act accounting forms, subpoenas, correspondence, Wells submissions, FOIA requests, confidential treatment requests and closing recommendations;
>
> (C) Other inter- or intra-agency memoranda, including all notes and other records prepared by the staff that the staff believes important to retain;
>
> (D) Records that have been made part of the record in an injunctive or administrative proceeding;
>
> (E) Such other records that the staff believes important to retain. The Commission normally does not need, for its own use, records that do not fall within categories A through D. However, there may be some unusual cases in which the staff believes it important to retain additional records.

Id. The memorandum described a sixth category, Category F, for "[a]ll other case material that does not fall within categories A-E but must be held due to FOIA concerns. This category was created in order to permit the Commission temporarily to store records . . . that are subject to a FOIA request and that would otherwise not be retained." *Id*. at 3.

The retention policy for records related to investigations was repeated, with some minor changes, in an August 20, 1993 Memorandum from William McLucas, then the Director of the Division of Enforcement, to all Enforcement personnel. August 20, 1993 Memorandum from William R. McLucas to All Enforcement Personnel ("the 1993 McLucas Memorandum"), attached as Exhibit 31. The retention policy for records related to investigations set forth in the 1989 Lynch Memorandum and reiterated in the 1993 McLucas Memorandum remained largely unchanged until a September 7, 2011 directive to retain all documents related to investigations, discussed in Section IV., below. *See, e.g.*, 2002 Case Closing Manual, attached as Exhibit 32, at 3; 2008 Case Closing Manual, attached as Exhibit 33, at 3.

C. Unlike its Policy with Respect to Investigations, the SEC's Longstanding Policy Prior to July 20, 2010 was to Destroy All Documents Related to Closed MUIs

As discussed below, on July 20, 2010, the SEC issued a directive to preserve certain documents related to MUIs (the "July 20, 2010 Directive"). Prior to the issuance of that directive, Enforcement's policy had been to destroy all documents relating to MUIs that were closed without becoming investigations. ENF4 Testimony Tr. at 11. As recently as June 2010, Enforcement's Case Closing Manual, which has been posted on Enforcement's Intranet since at least 2001, included the following directive: "After you have closed a MUI that has not become an investigation, you should dispose of any documents obtained in connection with the MUI." 2008 Case Closing Manual (in effect until June 2010), attached as Exhibit 33; *see also*, 2001 Case Closing Manual, attached as Exhibit 27; 2002 Case Closing Manual, attached as Exhibit 32.

ENF4 who has worked in Enforcement since 1987, testified that prior to the July 20, 2010 Directive, the SEC's "policy was that records that were obtained or generated in a MUI were to be destroyed at closing," and that this had been the "longstanding division policy" for as long as he had been in Enforcement. ENF4 Testimony Tr. at 8, 11-12. ENF10 ENF10 the Division of Enforcement's ENF10 ENF10, testified that he understood that Enforcement's policy prior to the July 20, 2010 Directive had been to dispose of documents in connection with a MUI when a MUI did not become an investigation, and that this policy had been in effect "for a long time . . . . I think it may be as old as MUIs." ENF10 Testimony Tr. at 12-13. Jeffery Heslop, the SEC's Chief Operating Officer since May 2010, testified that he understood that the practice at the SEC had been to destroy MUI documents for the 18 to 20 years prior to the July 20, 2010 Directive. Heslop Testimony Tr. at 9, 25, 32-33.

ENF4 testified that when the SEC first began using MUIs in the 1980s:

> [T]hose electronic [MUI] entries would be purged after two years. . . . There were Congressional issues with how we tracked – how we responded to MUIs that were reported by the SROs. So a decision was subsequently made, and it was in the late eighties, that we would cease purging the electronic flags that were planted in that MUI system. . . .
>
> [T]he implication was, even at that early date, nothing was really expected to be retained in a MUI, including the electronic reference, the electronic index that had been set up to track them.
>
> But a decision was made that it would be useful to continue tracking those and not purge those electronic indicators

> after the two-year period, and it was decided to maintain them indefinitely.
>
> But my understanding was always that that had nothing to do with the underlying – any papers that might have been obtained. And that the staff would continue destroying those papers.

ENF4 Testimony Tr. at 69-70.

The OIG did not find evidence of an improper motive behind Enforcement's longstanding policy of destroying documents related to closed MUIs that did not become investigations, although there was a lack of clarity as to the rationale for the policy. ENF4 testified that Enforcement's Office of Chief Counsel was responsible for the policy. *Id*. at 13. ENF4 testified, "I don't know that a specific reason was presented to me. It was just, 'This is how we treat these records. This is how we treat these materials.'" *Id*. at 12. McKown testified that she did not know why it was the SEC's policy to destroy documents after closing a MUI, and that the policy was put into place before she became the chief counsel for Enforcement in 1993. McKown Testimony Tr. at 9. ENF8 stated to the OIG that the MUI document destruction policy "was such an accepted procedure, it's hard to think why it was set up that way." ENF8 Interview Memorandum. Similarly, Heslop testified that he had "no idea" why the SEC's policy for years had been to destroy records related to MUIs. Heslop Testimony Tr. at 40. Adam Storch, the Managing Executive for the Division of Enforcement since 2009, testified that he did not "have any understanding why there was that policy." Storch Testimony Tr. at 9, 16.

ENF8 stated to the OIG that the policy to destroy MUI documents may have been set because MUIs were not viewed as valuable enough to keep. ENF8 Interview Memorandum. Additionally, the policy may have continued in part because of space concerns: as noted in Section I.E. below, ENF4 testified to a concern that MUI records be allowed to "sit" because the agency had been criticized for keeping materials on electronic servers for too long, and that preserving MUI records would contribute to "backlogs on things that would eventually have to be dealt with when we came to closing." ENF4 Testimony Tr. at 29-30.[5]

[5] The OIG did not find reasonable grounds to believe that there had been a violation of 18 U.S.C. § 2071, which prohibits the willful and unlawful destruction of Federal records. In order to satisfy the willfulness requirement of the statute, an individual must have acted intentionally with knowledge that he or she was breaching the statute. *See U.S. v. Simpson*, 460 F.2d 515, 518 (9th Cir. 1972); *U.S. v. North*, 910 F.2d 843 ("the parties are agreed that violations of 18 U.S.C. 2071(b) . . . require the unusually high mental element of knowledge of unlawfulness.") The OIG did not find evidence indicating that any individual at the SEC intentionally destroyed records with the knowledge that he or she was violating the statute.

D. In 2009 and 2010, the SEC's SEC1 Repeatedly Raised Concerns About the Disposition of MUI Records

All Federal records[6] are required by law to be identified by an agency disposition schedule that is approved by the National Archives and Records Administration ("NARA"). 36 C.F.R. § 1225. That schedule must include instructions for which types of records need to be retained permanently and which types of records, if any, may be retained on a temporary basis. *Id*. The current records retention schedule for the SEC's Division of Enforcement states that "Investigative Case Files (also known as 'complaint case' and 'general assignment files'), including case files relating to preliminary investigations,"[7] need to be retained for at least 25 years from the date of closure of the investigation. *See* Division of Enforcement Records Retention Schedule, attached as Exhibit 34; *see also* SEC1 Testimony Tr. at 16, 26.[8]

Enforcement's current records retention schedule was approved by NARA on December 9, 1992. Request For Records Disposition Authority, attached as Exhibit 35; *see also* SEC1 Testimony Tr. at 21. A memorandum accompanying NARA's evaluation of the SEC's proposed records retention schedule that was approved by NARA in 1992 reflected that NARA had reviewed the 1989 Lynch Memorandum. Exhibit 35 (at 3 of attached July 22, 1991 Arc2 Arc2 Memorandum). This NARA memorandum described the types of documents identified as Categories A through E in the 1989 Lynch Memorandum as necessary for retention, as well as Category F, which "contains any miscellaneous material that does not fall into the above categories but which must be kept in the event of a FOIA request on the case." *Id*. Enforcement's records retention schedule that was approved by NARA in December 1992 did not include any reference to MUIs. Exhibit 34.

On May 22, 2009, ENF4 sent SEC SEC1 t SEC1 SEC1 a draft amended retention schedule for submission to NARA. May 22, 2009 E-mail from ENF4 ENF4 to SEC1 SEC1 attached as Exhibit 36. ENF4 draft retention schedule included a section titled, "Matter Under Inquiry Files – Closed" that stated:

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[6] Records are defined by Federal law as:

> [A]ll books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them.

44 U.S.C. § 3301.

[7] Neither "investigation" nor "preliminary investigation" is defined in this schedule. Exhibit 34.

[8] The records retention schedule further states that, upon closing, case files for investigations found to meet certain criteria articulated in the schedule are to be transferred to the National Archives after 25 years. Exhibit 34; SEC1 Testimony Tr. at 16.

[9] SEC1 joined the SEC on SEC1 , after SEC1 of experience as an SEC1 SEC1 . SEC1 Testimony Tr. at 7-8.

> Matters Under Inquiry (MUI) files include information obtained in preliminary inquiries to determine whether to open the investigation. MUIs may be held open for no more than 60 days; if not closed prior to that point, MUIs are automatically converted to investigations. Maintained electronically, as computer records or otherwise, or in paper. . . .
>
> DISPOSITION: Temporary. Destroy upon closing.

Id. ENF4 accompanying e-mail explained, "I have added a new schedule for Matter Under Inquiry (MUIs). These files are destroyed upon closing of the MUI unless the MUI is converted into an investigation." *Id*.

SEC1 testified that he was unaware of the existence of Matters Under Inquiry until he began working with ENF4 on the draft amended retention schedule in 2009.[10] SEC1 Testimony Tr. at 33. SEC1 testified that from the point in time in which he learned of the existence of MUIs, he and SEC3 SEC3 the SEC's SEC3, consistently and repeatedly expressed the position to ENF4 that any documents in MUI files that fit any of the Category A through E descriptions in the 1993 McLucas Memorandum were "records," and that since such records were not scheduled with NARA, they needed to be treated as permanent until scheduled. *Id*. at 34-37, 48-50, 52. SEC1 testified that any destruction of such MUI records would have been inconsistent with the guidance he gave ENF4 in 2009. *Id*. at 48-50.

Multiple e-mails support SEC1 testimony that he and SEC3 repeatedly and consistently advised ENF4 and Enforcement that MUI records were unscheduled and needed to be retained, accordingly. SEC3 wrote in an e-mail to ENF4 and others on March 24, 2010, "The proposed policy (retention schedule for investigative files) is pending approval by [NARA]. Once approved by NARA, the SEC will have the authority to destroy MUIs which were never converted into investigations. Until we received [sic] this approval, the MUIs must not be destroyed."[11] March 24, 2010 E-mail from SEC3 SEC3 to PII, attached as Exhibit 37.

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[10] SEC1 supervisor Barry Walters, Director of the Office of FOIA, Records Management, and Security, testified that "at some point in 2010 it was brought to my attention that if a MUI was closed, that apparently the enforcement division was destroying some or all of those MUI records," and that it was "the position of the enforcement division, that this had been a longstanding practice of theirs, to dispose of these records in that way." Walters Testimony Tr. at 12-13.

[11] Enforcement sent NARA its proposed schedule in June 2009. *See* Exhibit 41. Approximately one year later, ENF4 expressed frustration that NARA had not responded to that proposed schedule. *Id*. ENF4 stated in a June 17, 2010 e-mail to SEC1 "[W]hen we sent our revised retention schedule to NARA (which was more than a year ago), I assumed we would receive a prompt reply. I understand that this may in fact take several more years." *Id*.

However, as ENF4 acknowledged in his OIG testimony, Enforcement did not change its policy or practice of destroying MUI documents in response to SEC3 e-mail direction. ENF4 Testimony Tr. at 17-18; *see also*, Exhibit 33, 2008 Case Closing Manual (in effect until June 2010), at 1. In fact, ENF4 responded to SEC3 e-mail that Enforcement "should continue to act as [it had] in the past with respect to these records." *See* Exhibit 37. In his e-mail response, ENF4 stated:

> I think we should discuss this issue. In the past, MUIs were treated as an abbreviated form of investigation; if closed without a formal investigation being opened, **it was assumed that none of the documents fell into Categories A-E of the McLucas memo and thus could be destroyed**. The amendment to the retention schedule was intended to make that treatment explicit, but not to suggest that MUI records have to [sic] retained in the absence of a line item in the schedule. Until the retention schedule is approved, I believe we should continue to act as we have in the past with respect to these records.

Id.[12] (emphasis added). ENF4 testified that he did not recall whether he actually followed up his e-mail with a discussion regarding the issue. ENF4 Testimony Tr. at 17.

On June 1, 2010, SEC1 reiterated that, "If MUIs are unscheduled federal records they need to [be] maintained and treated as permanent until an approved records schedule is enacted. This treatment of MUIs is procedurally correct regardless of how they were previously treated." June 1, 2010 E-mail from SEC1 SEC1 to Darcy Flynn, attached as Exhibit 38. Flynn forwarded this e-mail later that day to ENF4 and wrote, "ENF4 can you please see the email string below and advise on how to proceed. My understanding from SEC1 [SEC1 s email is that, absent some other policy, we'll have to retain these docs." *Id.* Two days later, Flynn wrote another e-mail to ENF4 and others, stating:

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[12] The OIG investigation found that there may have been a disconnect between the Office of Chief Counsel's assumption that Category A-E records were not created in the course of MUIs and the investigative staff's actual conduct of MUIs. As discussed below in Section II, the OIG found that it was not unusual for such records to be created during the conduct of MUIs. In contrast to the actual practice, ENF4 testified that, "My sense was always that we were not generating documents that had to be retained in the MUIs." ENF4 Testimony Tr. at 13. SEC2 SEC2 the SEC2 for Enforcement, similarly testified that "the viewpoint, at least from ENF4 ENF4 and all of the information I was told was that you would not have category A through E created in a MUI." SEC2 Testimony Tr. at 33. Storch testified that ENF4 had informed him that it was "extremely rare" for material falling into categories A though E of the 1993 McLucas Memorandum to be created in the course of a MUI. Storch Testimony Tr. at 47. McKown testified that it was communicated to the Enforcement staff that MUIs were "a quick look and that you were to open it up as an investigation if you were going to be doing anything significant." McKown Testimony Tr. at 23. McKown testified that "you could call someone and talk with them, but the intention was of course that you not do anything substantive while you were in the MUI phase." McKown Testimony Tr. at 9. It is clear, however, from the OIG's review of particular MUIs that were closed without becoming investigations, that it was not unusual for records falling into Categories A through E of the 1993 McLucas Memorandum to be created in the course of MUIs, as discussed in Section II.

> [W]e need guidance on this asap as the Records Disposition group is getting bottle necked with these MUI related docs. SEC1 [SEC1 s email appears to put us on notice that our current practice of discarding these MUI related docs may be unauthorized. We need either clear authorization to discard them or updated Enforcenet guidance on their retention.

June 3, 2010 E-mail from Darcy Flynn to SEC1 SEC1 attached as Exhibit 39. On June 7, 2010, ENF4 wrote in an e-mail to Flynn:

> We really do need to discuss. . . . [T]he MUI records can't be allowed to sit. The goal of adding them to the revised retention schedule was [to] cut off any question that we can destroy them when they are no longer needed. But it may be necessary to pull back the schedule and redefine them as investigatory records to be disposed of under the McLucas categories.

June 7, 2010 E-mail from ENF4 ENF4 to Darcy Flynn, attached as Exhibit 40. ENF4 testified that he wrote that MUI records could not be allowed to "sit" because the agency had been criticized for keeping materials on electronic servers for too long, and that preserving MUI records would contribute to "backlogs on things that would eventually have to be dealt with when we came to closing." ENF4 Testimony Tr. at 29-30. Flynn responded to ENF4 via e-mail, "Thanks ENF4 I agree the sooner the better. One point: under the McLucas categories we would also keep any correspondence under Category B and internal memos under Category C, correct?" Exhibit 40. The OIG did not find that ENF4 responded to Flynn's e-mail regarding the need to retain Category B correspondence and Category C memoranda related to closed MUI files.

E. On June 16, 2010, the SEC's SEC1 Directed Enforcement to Preserve its MUI Records

On June 16, 2010, SEC1 sent a memorandum titled, "Records Management Guidance" to Storch, SEC2 McKown, Walters, and others, writing in his accompanying e-mail that this guidance was being sent "in response to multiple inquiries." June 16, 2010 E-mail from SEC1 SEC1 to Adam Storch, attached as Exhibit 41.[13] SEC1 testified that he wrote and circulated this memorandum because he had not

[13] McKown testified that, although she was aware of there being issues concerning the retention of MUI documents, she was preparing for her departure from the agency in July 2010 and did not become involved with any such issues. McKown Testimony Tr. at 7, 16-20. ENF4 and ENF10 each testified that they did not have any discussions with McKown concerning the treatment of records relating to MUIs. ENF4 Testimony Tr. at 24; Walden Testimony Tr. at 25. Storch also testified that he did not recall McKown being very involved in issuing guidance concerning MUI records in June or July of 2010. Storch Testimony Tr. at 36.

been getting direct responses from [redacted] concerning his previous e-mails on the issue of MUI records. [redacted] Testimony Tr. at 54.

[redacted] June 16, 2010 Records Management Guidance stated: "MUIs are federal records. MUIs are currently unscheduled. Unscheduled federal records **must** be treated as permanent until they are scheduled (Authority 44 U.S.C. section 3102 and 36 CFR 1225.14.) Therefore, to avoid the unauthorized destruction of federal records the Division of Enforcement **must** maintain MUIs until further notice." Exhibit 41 (emphasis in original). [redacted] testified that he still had not received clarification from Enforcement as to what MUIs were and what records they generated, so he thought it was safer to issue broad guidance to preserve all MUI documents until he received clarification from Enforcement on this issue.[14] [redacted] Testimony Tr. at 49, 60-61.

[redacted] wrote in a responding e-mail to [redacted] and Storch, "Our current practice is not to retain these records . . . . To be clear, it isn't illegal to keep records too long – but there are financial costs to be considered, as well as the risk of creating confusion for staff." Exhibit 41. Storch forwarded [redacted] e-mail to [redacted] who wrote in a responding e-mail, "I completely agree with [redacted] [redacted] but the problem we get into is that the current records policy is very vague and does not openly address the MUI issues. . . . . I have told Darcy [Flynn] to be on the conservative side and retain the A-F documents for the MUIs . . . ." *Id.* [redacted] testified that she was "very surprised that the records retention schedule was [only] the one page," noting that the records retention schedule for the [redacted], where [redacted] worked prior to her employment at the SEC, was "just more explicit." [redacted] Testimony Tr. at 25. Walters testified that Enforcement was concerned about the amount of space and volume of documents that would need to be preserved under [redacted] guidance. Walters Testimony Tr. at 15-16.

On June 16, 2010, [redacted] wrote in response to [redacted] directive to maintain MUI documents:

> In my view, we should make no changes in our current practices with respect to . . . MUI files. . . . Our current retention schedule covers "case files relating to preliminary investigations." In the past, when a MUI was closed, any records that would fall within Categories A-E (and this meant the occasional investigative testimony transcript) were not to be destroyed upon closing, but were to be sent to storage in the same manner as other investigatory material that had to be retained under our schedule. However, current policy is to open a formal investigation

[14] [redacted] testified that "a lot of my conversations in trying to schedule with [redacted] [redacted] were not as forthcoming on his side as I hoped would be in trying to schedule records for an agency during that period." [redacted] Testimony Tr. at 37-39.

> before taking any testimony, seeking a formal order, or generating other documents that would require retention under the McLucas memo. Adding MUIs to the draft retention schedule was intended only to make the status of these investigations clearer. Until the new schedule is adopted, MUIs should be deemed still to be within the scope of the existing schedule, and any documents not required to be held under Categories A-E should be destroyed upon closing.

June 16, 2010 E-mail from ENF4 ENF4 to SEC1 SEC1 attached as Exhibit 42.

Flynn testified that ENF4 statement in the above e-mail that when a MUI was closed, any records that fell within Categories A-E were not destroyed upon closing but rather preserved in the same manner as similar records from investigations, was false. Flynn Testimony Tr. at 98-102. The testimony of other witnesses contradicted ENF4 statement in that June 16, 2010 e-mail as well. Storch testified, "As I look at the case closing guidance [prior to July 2010] . . . [t]here's no carve-outs for anything. It basically – it doesn't provide that caveat to say if it – if by chance you create something A to E, you should retain it just like you would do if it was an investigation." Storch Testimony Tr. at 24. McKown testified that Enforcement lawyers were not expected to keep MUI documents once a MUI was closed and not converted into an investigation, and that she was not aware of any effort that was taken by Enforcement lawyers to keep certain MUI documents upon closing the MUI. McKown Testimony Tr. at 14, 23.

On June 18, 2010, Storch wrote to Walters and others in an e-mail:

> While we are eager to reach consensus, we hope to avoid the confusion of changing our long standing policy, only to revisit it in a week or so when we meet on the 28th. Therefore, I think it more prudent, and plan to continue under the current policy for the brief interim.

Exhibit 42. Storch testified that "I needed a bit of time to react to [SEC1 directive] and to create an adequate communication to all staff." Storch Testimony Tr. at 21.

Walters responded to Storch's e-mail on June 19, 2010:

> Clearly there are some different opinions here, but I think the one that matters most at this point is the official with the responsibility for setting policies and procedures for the agency's records management program, SEC1 SEC1 For now, his June 16th memo should be treated as directive in nature. The existing authority to destroy the records in question is now suspended.

Exhibit 42. Walters testified with regard to his e-mail, "[Y]ou're trying to at least stop the train from going down the track when passengers are hanging off the sides." Walters Testimony Tr. at 20. ENF4 wrote in a June 21, 2010 e-mail to Storch and others, "At this point, it looks like the safest course for Enforcement staff is to retain MUI records until" meeting with SEC1 on June 28, 2010. Exhibit 42.

However, according to Storch, Heslop overruled Walters at Storch's request. Storch Testimony Tr. at 31. Storch testified, "At this point . . . I thought I needed to get Barry [Walters'] boss [Heslop] involved." *Id*. Storch testified that Heslop agreed with Storch that, although Enforcement guidance needed to go out, it needed to be carefully crafted, and that "Heslop gave me basically the green light to hold off until we had crafted a message that all of us were comfortable with." *Id*. at 32-33. Contemporaneous e-mails corroborate Storch's testimony that Heslop overruled Walters and SEC1 [15]

On June 21, 2010, Walters forwarded SEC1 Records Management Guidance to Heslop. June 21, 2010 E-mail from Barry Walters to Jeffery Heslop, attached as Exhibit 43. Walters described in an accompanying e-mail to Heslop the disagreements between SEC1 and the Enforcement staff on this issue, including Walters' instruction to Enforcement that SEC1 guidance "should be treated as directive in nature and that the existing authority to destroy the records in question is now suspended." *Id*.

On June 22, 2010, Storch wrote in an e-mail to Heslop, "Jeff – thanks for your assistance on this. As discussed, we will not issue SEC1 SEC1 updated guidance to enforcement staff until we are able to discuss in more detail with Barry [Walters] and consider alternative approaches." June 22, 2010 E-mail from Adam Storch to Jeffery Heslop, attached as Exhibit 44. Storch then wrote to ENF4 and others, "Jeff Heslop, the new COO, advised that I should NOT send out the updated guidance to ENF staff for now . . . ." *Id*.

On June 28, 2010, Storch, Walters, ENF4 and SEC1 met concerning the disposition of MUI records. June 28, 2010 E-mail from Adam Storch to Joan McKown, attached as Exhibit 45; June 30, 2010 E-mail from Barry Walters to Adam Storch, attached as Exhibit 46; SEC1 Testimony Tr. at 65. SEC1 testified that, at this meeting, Enforcement expressed "significant consternation that I had issued guidance that was going to affect all of their work processes and that they were hesitant to do that." SEC1 Testimony Tr. at 64-69.

After the meeting with Walters and SEC1 Storch e-mailed ENF4 and SEC2 and explained the need for a follow-up meeting among certain Enforcement staff, "Just to

[15] Heslop testified that he did not recall explicitly telling Storch not to send out SEC1 update guidance to the Enforcement staff, but rather that: "I said, basically, as I would with any other matter, you guys go get your heads together and figure this out. . . . I certainly don't recall overruling Barry Walter's directive." Heslop Testimony Tr. at 17-18.

bring everyone up to date – it looks like we're going to have to maintain docs associated with MUIs until the records schedule is approved by NARA. This meeting is to briefly discuss the communications we should send out, and the associated guidance/training that we should consider rolling out with this interim policy." Exhibit 45; *see also* Exhibit 46. However, as discussed below, the contemplated guidance was not sent to Enforcement staff until three weeks later.

F. In Late June 2010, a SEC Staff Attorney Contacted NARA Concerning the Destruction of MUI Records

Flynn testified that, shortly after SEC1 June 16, 2010 guidance had been issued concerning the preservation of MUI records, Flynn had a conversation with an individual at NARA in which he informed the individual at NARA that the SEC had been destroying records relating to MUIs for years, that there was a disagreement with the SEC's SEC1 SEC1 as to what records needed to be preserved relating to MUIs, and during which Flynn requested from NARA a "temporary reprieve" from directive to preserve all MUI records. Flynn Testimony at 113-115.[16] Flynn testified that the individual at NARA told him that NARA could not grant a temporary reprieve from SEC1 directive. *Id*. at 114.

On July 19, 2010, SEC1 wrote in an e-mail to Walters:

> . . . I met with National Archives staff on Friday, July 16 to discuss various SEC records topics. Toward the end of the meeting they notified me that Darcy Flynn had called them in June and during that conversation he asserted that the SEC's Division of Enforcement had been destroying MUI's for 17 years. I asked if that was exactly what he said and they stated that Darcy queried about treatment of the records and was told that since the records are unscheduled they must be treated as permanent until scheduled and in response he clearly responded something to the effect that we have been destroying these for years. Due to the nature of this call they indicated that it was their responsibility to send a notification of unauthorized destruction letter to SEC for our response . . . .
>
> As a result of this phone call, within the next couple of weeks the National Archives will be sending a formal letter notifying the SEC in writing that records have allegedly been destroyed and requesting an agency response within 30 days of receipt of that letter.

[16] Flynn testified that he did not know with whom he had spoken at NARA. Flynn Testimony Tr. at 114.

> Due to the issues concerning MUIs brought to their attention, the National Archives informed me that it was unlikely that MUIs would be a candidate for fast track scheduling. Since, these records were potentially destroyed without authorization their profile has been elevated because the National Archives will have to report concerning resolution of the issue. Therefore, the National Archives would have to be extremely diligent in reviewing the records during the scheduling process, i.e. meeting with program officers and other staff creating and using the records, and viewing multiple MUIs as samples.

July 19, 2010 E-mail from SEC1 SEC1 to Barry Walters, attached as Exhibit 47. Walters testified that, upon learning that Flynn had notified NARA that the SEC had been destroying documents related to MUIs for seventeen years:

> [M]y initial thought was, he was probably right. That from the time of the [1993] McLucas Memo up until – you know, I came on board in October 2009, and this started bubbling up in June of 2010. That they had been destroying these MUIs for 17 years with their position that it wasn't a problem for them to do that. . . . [B]ased on everything I knew that transpired during this period, my understanding was that had been their standard practice.

Walters Testimony Tr. at 33, 42-43.

Walters immediately forwarded SEC1 e-mail to Heslop and Storch. Exhibit 47. Storch's e-mail reaction was, "After our conversation on 6-24, we talked with Darcy [Flynn] that day and instructed him that he should no longer have direct conversations with NARA."[17] *Id*.

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[17] SEC2 testified regarding her reaction to learning about Flynn's contact with NARA as follows:

> I said [to Flynn], "So how come you didn't raise the issue, you know, give us a heads up?" And I think SEC1 SEC1 was a little miffed at the fact – because SEC1 SEC1 is our main liaison with NARA – why we didn't consult with SEC1 and why —well, actually I know SEC1 SEC1 was miffed. . . . I said [to Flynn], "You know, next time you need to give SEC1 SEC1 the heads-up before you actually reach out and – so that he's aware of this because he prefers to be the liaison with NARA."

SEC2 Testimony Tr. at 45.

G. On July 20, 2010, Enforcement Sent Division-Wide Guidance to Preserve MUI Records

On July 20, 2010, one month after SEC1 directed Enforcement to retain MUI documents and one day after Storch and Heslop learned that Flynn had told NARA that the SEC had been destroying records relating to MUIs for 17 years, Enforcement sent the following guidance to all Enforcement staff regarding the preservation of MUI documents:

> The SEC SEC1 has recently advised the Division of Enforcement that certain records generated in a [MUI] are required to be retained due to limitations with our current records policy. As a result, effective immediately, when closing a MUI that does not lead to an investigation, documents must be processed consistent with the processing of documents for closed investigations, with one exception: until ENF's pending revised records retention schedule receives approval, retained MUI documents cannot be sent to the Federal Records Centers and, as a result, should be kept at Iron Mountain. . . .
>
> Currently, MUIs do not generate several of the . . . documents often generated in investigations, including Category A transcripts and exhibits, Category B formal orders and subpoenas, Category D litigation documents, etc. As a result, closed MUIs generally will require the retention of fewer documents than closed investigations. The types of documents to preserve for MUIs will typically be:
>
> Category B: correspondence, both paper and email.
>
> Category C: inter or intra agency memoranda, including memos to the file.
>
> Category E: documents, if any, that support the conclusion not to open an investigation.
>
> Category F: documents not already retained but responsive to a pending FOIA request.

July 20, 2010 Enforcement Records Management and Disposition E-mail, attached as Exhibit 48.

II. The OIG Found that the SEC's Enforcement Staff Destroyed Documents Related to Closed MUIs that Should Have Been Preserved as Federal Records

There is disagreement among the SEC staff as to whether MUIs are "preliminary investigations" as that term is used in Enforcement's records retention schedule. ENF4 testified that it was his "view that [MUIs] were covered by the existing retention schedule as preliminary inquiries, as preliminary investigations."[18] ENF4 Testimony Tr. at 26. SEC1 view is that MUIs are not "preliminary investigations" as that term is used in Enforcement's records retention schedule. SEC1 Testimony Tr. at 100-101; *see also* June 16, 2010 Records Management Guidance to Enforcement, attached as Exhibit 41 ("MUIs are currently unscheduled.")[19]

Whether or not MUIs are referenced as "preliminary investigations" on the SEC's records retention schedule, documents created during the conduct of a MUI falling into Categories A through E of the 1993 McLucas Memorandum should have been preserved. ENF4 conceded during his OIG testimony that Category A-E records created during the conduct of a MUI should have been preserved. ENF4 Testimony Tr. at 48, 82. As discussed above, ENF4 had assumed incorrectly for years that such records were not created during the conduct of MUIs. However, ENF4 acknowledged during his OIG testimony that, "to the extent that there was an issue about correspondence [being generated in the course of a MUI], I admit I had never focused on that before." ENF4 Testimony Tr. at 34.

Similarly, SEC1 testified that if MUIs were not "preliminary investigations," as he believed, then any Category A-E records created during the conduct of a MUI were unscheduled and should have been preserved accordingly.[20] SEC1 Testimony Tr. at 101-103; *see also*, SEC1 Interview Memorandum at 2. In fact, the only practical

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[18] Flynn's attorney has also made the argument that MUIs and preliminary investigations are pseudonymous, citing the use of the phrase "preliminary investigation" in contexts applicable to MUIs, including the 2009 Congressional Testimony by a former Enforcement Director. August 19, 2011 Letter from Gary Aguirre to Paul Wester, attached as Exhibit 49, at 2-5.

[19] The Division of Enforcement stated, in a September 14, 2011 letter to Senator Charles Grassley, that "it is difficult to conclude with certainty the intended meaning of the 1992 reference to preliminary investigations," but that various historical SEC references to the term "preliminary investigation" suggest that it referred to informal investigations (i.e., investigations without a formal order of investigation), not MUIs. September 14, 2011 Letter from Robert Khuzami to Charles Grassley, attached as Exhibit 50, at 7. These include a reference in the Enforcement records retention schedule to "preliminary investigations" in 1975, which appeared to predate the creation of MUIs (in 1981, according to ENF4 testimony). *Id*.; *see also*, August 11, 1975 Request For Authority to Dispose of Records, attached as Exhibit 51; ENF4 Testimony Tr. at 69.

[20] SEC1 stated to the OIG that he originally had advised Enforcement in June 2010 that all MUI documents be retained because he had determined that MUI documents were not scheduled, and was seeking more information as to what a MUI was so that he could determine which MUI documents were records that needed to be retained. *See* SEC1 Interview Memorandum. He stated upon this review, he determined that MUI documents falling into Categories A through E of the 1993 McLucas Memorandum were considered records that need to retained. *Id*.

difference between the two views of whether MUIs are "preliminary investigations" is the length of time that the records must be preserved. As NARA explained to the OIG in an August 31, 2011 letter:

> NARA concluded that MUI records were unscheduled based on the information initially provided to us by Mr. Darcy Flynn when he met with our staff in 2010 . . . .
>
> However, based on the information provided in [the OIG's] letter, as well as the August 19, 2011 letter from Mr. Flynn's attorney, NARA recognizes that MUI records could well be synonymous with "preliminary investigation" records under [the current Enforcement schedule]. NARA would need to conduct a more detailed appraisal to reach a conclusion as to whether MUI records are equivalent to preliminary investigation records.
> . . .
>
> If MUI records are scheduled under [the current Enforcement schedule], then their disposition would be 25 years, per disposition 3 of the item "Investigative Case Files – Closed" (which includes "files relating to preliminary investigations"), and any prior destruction would be unauthorized to the same extent as if they were unscheduled.
>
> If, on the other hand, MUI records are unscheduled, they must be deemed *de facto* permanent records of the SEC, and cannot be deleted or otherwise destroyed as temporary records unless and until an approved SF-115 is signed by the Archivist of the United States after provision for notice in the Federal Register. . . .
>
> [T]he SEC is obligated to retain the records described in Categories A-E [of the 1993 McLucas Memorandum], whether the records are unscheduled or covered by a 25 year disposition . . . .

August 31, 2011 Letter from Paul Wester to H. David Kotz, attached as Exhibit 52.

According to Enforcement, between October 1, 1992, and July 20, 2010, Enforcement opened 23,289 MUIs. MUI Measures Chart, attached as Exhibit 53. Of those 23,289 MUIs, 12,821 either became an investigation or merged with another

already-open MUI or investigation. *Id*. The remaining 10,468 MUIs were closed without becoming an investigation or another MUI.[21] *Id*.

In light of the facts that (1) it was Enforcement's longstanding written guidance to "dispose of any documents obtained in connection with" a MUI upon closure and (2) it was not a rare occurrence for records falling into Categories A through E of the 1993 McLucas Memorandum to be created in the course of a MUI, it is certain that records were destroyed in connection with the over 10,000 MUIS that were closed without becoming investigations. Because of the scarcity of information related to these MUIs, faded memories, and staff turnover, it is impossible to determine how many MUI records were destroyed during this time period.

The OIG investigation, has identified, however, several specific instances in which MUI records were destroyed in accordance with Enforcement's pre-July-2010 guidance. In fact, a few minutes after the July 20, 2010 MUI guidance was sent to the Enforcement Division staff, ENF6 ENF6 an Enforcement staff attorney, sent an e-mail to SEC3 stating: "I received approval to close a MUI last week and I shredded the documents and deleted e-mails yesterday (Monday). Is that a problem?" *See* Exhibit 48. This MUI, titled, In the Matter of Heritage Investment Capital, MHO-11418, was initiated by a referral from the Depository Trust & Clearing Corporation ("DTCC") concerning a potentially fraudulent bond offering by Heritage Investment Capital ("HIC"). ENF6 Testimony Tr. at 8; HUB Closing Narrative for MHO-11418, attached as Exhibit 54 at 1.[22] ENF6 testified that, in the course of this MUI, the Enforcement staff interviewed several individuals. ENF6 Testimony Tr. at 9; *see also* Exhibit 54 at 2. ENF6 prepared a memorandum of these interviews which she e-mailed to her supervisor as part of a closing recommendation. June 16, 2010 E-mail from ENF6 ENF6 to PII PII, attached as Exhibit 55. ENF6 Testimony Tr. at 10, 12. ENF6 testified that the staff also requested a copy of the HIC bond itself, as well as amendments to the bond, from DTCC, and that DTCC then e-mailed the bond and its amendments to ENF6 *Id*. at 10, 25. ENF6 testified that upon closing the MUI, ENF6 shredded the bond and the amendments to the bond, and deleted the e-mail correspondence from DTCC to which the bond and amendments were attached. *Id*. at 13-15, 25. The staff attorney testified that she understood such correspondence to be a record falling under Category B of the 1993 McLucas Memorandum. *Id*. at 25; Exhibit 31. ENF6 testified that she also deleted several e-mails corresponding with individuals interviewed by the staff. ENF6 Testimony Tr. at 15. ENF6 testified that she destroyed these documents in accordance with the policy on the Enforcement intranet system at that time. *Id*.[23]

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[21] The most frequent reasons given in the electronic case-tracking database for closure of MUIs that did not become investigations are: (1) inappropriate for Enforcement action; (2) closed due to "Resource Limits;" or (3) referred to a Federal, state, or local agency or self-regulatory organization. *See* Exhibit 53.

[22] According to the written closing narrative for this MUI, the MUI was closed because "it appears that no U.S. investors were harmed and it appears that the Offering memorandum was never circulated to U.S. investors." Exhibit 54 at 1; *see also* ENF6 Testimony Tr. at 12-13.

[23] ENF6 testified that she did not destroy her summary of witness interviews for this MUI, nor did she delete the initial referral from DTCC. *Id*. at 14-15.

On July 21, 2010 SEC3 responded to ENF6 e-mail by writing:

> Thank you for the information. Please follow the guidance as issued in the Administrative Notification for all future MUIs or any that you may have open. We are currently analyzing any issues related to previous treatment of MUIs. If we have additional questions we will contact you as they arise.

July 21, 2010 E-mail from SEC3 to ENF6 attached as Exhibit 56. ENF6 testified that if she had been informed at this time "that there was a problem, I also would have contacted [an individual at DTCC] again to have him send the bond back to me and try to recreate the documents," but that because nobody at the SEC informed her that her destruction of documents was a problem, she did not seek to retrieve these documents. ENF6 Testimony Tr. at 18-19.

The OIG investigation has also found other instances of MUI record destruction. The OIG requested from the SEC's Office of Records Management Services any records pertaining to fifteen particular MUIs that Flynn referenced in his allegations, spanning in time from 1993 through 2009. September 6, 2011 E-mail from SEC5 attached as Exhibit 57. The Office of Records Management Services responded that it has no record of ever receiving the files for these MUIs, and that "despite an extensive search of our holdings and finding aids . . . we cannot locate the material . . . . Since the items are currently unavailable we cannot produce the records you have requested . . . ." *Id.*

In addition, the OIG reviewed the SEC's electronic database entries in NRSI for these MUIs, and interviewed SEC staff that had been assigned to these MUIs, in an effort to determine whether records had been created and whether they had been destroyed in connection with these MUIs. As a result of this review, the OIG has found several other instances in which records falling into Categories A through E were created and, in some of these instances, subsequently destroyed.

For example, the electronic database for Lehman Brothers Holdings, MNY-0713, indicated that the MUI was opened in March 4, 2002, and closed on July 11, 2002, that the MUI was opened because the SEC received anonymous correspondence on the letterhead of Lehman Brothers' auditors, Ernst and Young, and that the staff obtained voluntary document production from Lehman Brothers. NRSI and HUB Enforcement Detail, MNY-07013, attached as Exhibit 58. Records created in the course of this MUI included the original complaint on Ernst and Young letterhead, correspondence from the SEC requesting documents from Lehman Brothers, and correspondence to accompany Lehman Brothers' document production. August 31, 2011 E-mail from ENF2 ENF2 attached as Exhibit 59.

For this Lehman Brothers Holdings MUI, the OIG investigation found that records falling into Category A through E of the 1993 McLucas Memorandum were subsequently destroyed pursuant to Enforcement guidance at that time. The staff attorney assigned to this MUI stated to the OIG that, although he had no print documents for this MUI and would have discarded the documents upon closure in accordance with Enforcement policy at that time, he was able to access electronic records for the MUI on the SEC's shared "J-Drive" for this matter. ENF2 Interview Memorandum. However, although some records from this MUI were preserved on the J-Drive, such as draft correspondence from the SEC requesting documents and an intraoffice memorandum, other records, such as: (1) the original complaint on Ernst and Young letterhead; (2) the final document request sent by the SEC to Lehman Brothers; and (3) the correspondence that would have accompanied Lehman Brothers' documents production (both of which would be considered Category B correspondence), were unable to be located, on the J-Drive or elsewhere. *See* Exhibit 59.

In other instances, the Enforcement staff appeared to have retained all records generated in connection with a MUI, in spite of the Enforcement guidance prior to July 20, 2010, to destroy all documents upon closing MUIs. For example, all of the records generated in connection with MNY-08145, AIG Insider Trading, including a document request, document production cover letter, and correspondence from the Department of Labor, appear to have been preserved by the staff. NRSI and HUB Enforcement Detail, MNY-08145, attached as Exhibit 60; ENF7 Interview Memorandum; *see also* Dicke Interview Memorandum; NRSI Enforcement Detail, MSF-03174, attached as Exhibit 61 (for MSF-03174, Morgan Stanley, the only apparent record generated for this MUI, complaint correspondence, was preserved); ENF7 Interview Memorandum; NRSI and HUB Enforcement Detail, MNY-08198, attached as Exhibit 62 (MNY-08198, Goldman Sachs, Trading in AIG CDS, was opened due to a tip via correspondence; this correspondence, and correspondence related to documents produced by Goldman Sachs, was retained by staff).

These examples of record creation during MUIs reflect a not uncommon practice by Enforcement staff to request documents from third parties in the course of a MUI. The staff attorney in the Enforcement Division who performed work on the Heritage Investment Capital MUI, described above, testified that she did not have an understanding that the staff was prohibited from requesting documents or corresponding with individuals or entities in connection with a MUI, and that "I've definitely sent out paper correspondence in connection with MUIs that I ended up closing and received interagency and intra-agency memoranda, for instance, from [Financial Industry Regulatory Authority] or from [Chicago Board Options Exchange] or that kind of thing." ENF6 Testimony Tr. at 28.

For other of these MUIs, the OIG investigation found that it was unlikely that Category A through E records were created in connection with the MUI. For example, the electronic database record for Citigroup Related Party Disclosures, MHO-10176, indicated that it was opened on March 3, 2005, as a result of an article in news media,

and was closed on April 26, 2005. NRSI Enforcement Detail, MHO-10176, attached as Exhibit 63. The staff attorney assigned to this MUI stated to the OIG that the work done in this matter solely consisted of reviews of news articles and public filings, that no documents were requested, and that no interviews were conducted in the course of this MUI. ENF3 Interview Memorandum; *see also* NRSI and HUB Enforcement Detail, MHO-10760, attached as Exhibit 64; ENF1 Interview Memorandum (no records created in the course of MHO-10760 MUI, Bank of America, NA).

There were also MUIs in which, due to a lack of records, staff turnover, and/or faded memories, the OIG investigation was unable to determine whether records had been generated or destroyed in the course of the MUI. While there remain electronic records in the SEC's NRSI and HUB databases for these MUIs, in some of the MUIs, the information in the electronic databases consisted of only limited information. For example, in Deutsche Asset Management, MHO-09945,[24] the SEC's electronic database only indicated that the MUI was opened on April 13, 2004, closed on May 20, 2004, for being "inappropriate for Enforcement action," and concerned a possible "unauthorized transaction." NRSI Enforcement Detail, MHO-09945, attached as Exhibit 65. The staff attorney assigned to the MUI has since left the Commission. The branch chief assigned to the matter stated to the OIG that he was unable to locate any electronic or print records for the MUI, and was unable to recall information about the matter sufficient to determine whether records had been created during the MUI. *See* ENF5 Interview Memorandum. The Office of Records Management Services was unable to locate any records in connection with this MUI. Exhibit 57. Thus, the OIG was unable to determine whether any records were created and subsequently destroyed in connection with this MUI. *See also* NRSI Enforcement Detail, MNY-07012, attached as Exhibit 66; Calamari Interview Memorandum (unable to locate documents for Credit Suisse First Boston – CDO Matter, MNY-07012, and no knowledge as to whether any documents were created); NRSI Enforcement Detail, MSF-03288, attached as Exhibit 67; ENF9 Interview Memorandum (did not recall her role in MSF-03288, Wells Fargo & Co., and unable to find any files for the matter beyond an e-mail opening the matter).

The OIG also looked for evidence that records in connection with any MUI related to Bernard Madoff were destroyed. According to notes from an August 23, 2010 meeting, discussed in greater detail below, Storch had stated during that meeting that records from a MUI involving Bernard Madoff had been destroyed. Notes of August 23, 2010 Meeting, attached as Exhibit 68, at 4. Storch testified that he did not recall making this statement at a meeting, but that this may have been discussed at the August 23, 2010 meeting. Storch Testimony Tr. at 90-91. ENF4 testified that he did not remember this statement being made, but that "presumably if the Madoff MUIs were closed in this period, then the records would have been treated like any other records . . . [a]nd destroyed." ENF4 Testimony Tr. at 64. ENF10 testified that he did not recall a Madoff

[24] This MUI is unrelated to the SEC investigation of statements by a Deutschebank executive that is the subject of OIG-564, which concerns allegations that the PII PII.

MUI being mentioned in this meeting, "but I do have a recollection of learning, or being told at some point, that, you know, going back to the Madoff investigation, it was – at least one of them was in a MUI stage. And so consistent with our policy, those documents were probably destroyed." ENF10 Testimony Tr. at 33. ENF10 testified that he might have learned this from Storch. *Id*.

The OIG found several MUIs to have been opened at the SEC relating to Bernard Madoff or Bernard Madoff Investment Securities, LLC. One such MUI, MNY-01498, titled, In the Matter of King Arthur, opened in 1992, became part of an investigation, NY-06066 and, thus, the Enforcement policy to destroy documents upon closing MUIs that did not become investigations did not apply. *See* NRSI Enforcement Detail, MNY-01498, attached as Exhibit 69. Similarly, MNY-07563, Certain Hedge Fund Trading Practices, became an investigation, NY-07563, on January 24, 2006, and so the Enforcement policy to destroy documents upon closing MUIs that did not become investigations was inapplicable to this instance. *See* NRSI Enforcement Detail, MNY-07563, attached as Exhibit 70. The OIG was able to obtain copious amounts of records generated during these MUIs and investigations as part of its 2009 Investigation of Failure of the SEC to Uncover Bernard Madoff's Ponzi Scheme, OIG-509.[25]

On April 4, 2001, the LARO opened a MUI titled Certain Broker Dealers In Violation Of Limit Order Display Rule, MLA-02469, as a result of a referral from the Office of Compliance Inspections and Examinations concerning possible violations of the limit order display rule by the broker-dealer business of Bernard L. Madoff Investment Securities, LLC and two other firms. NRSI Enforcement Detail, MLA-02469, attached as Exhibit 71. The Enforcement Staff closed this MUI on November 20, 2001, because "the staff has determined that this matter is inappropriate for enforcement action given that the systems problems that resulted in the Display Rule violations appear resolved." *See* CATS 2000 Entry Form, MLA-02469, attached as Exhibit 72. The staff attorney and branch chief assigned to this MUI have since left the Commission. The OIG was able to obtain records generated during this MUI as well in the course of OIG-509.[26]

The OIG found two other MUIs in which neither Madoff nor his firm appeared to be the primary focus, but which listed Madoff as a "Related Name." The NRSI database entry for a MUI titled Teledata Financial Corp., MNY-01592, which was opened on November 20, 1992, and closed on September 21, 1993, as "Inappropriate for Enforcement Action," listed Bernard Madoff, among others, as a "Related Name." NRSI Enforcement Detail, MNY-01592, attached as Exhibit 73. No Enforcement staff is listed in the NRSI entry for this MUI (apart from the Director of the New York Regional Office [NYRO], who did not work at the SEC during the time period of the MUI but whose name was listed merely because he was the current head of the office.) *Id*. The database

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[25] The documents obtained in the course of OIG-509 enabled the OIG to complete its comprehensive analysis of the SEC's failure to uncover Bernard Madoff's Ponzi scheme. *See* Report of Investigation No. OIG-509, http://www.sec.gov/news/ studies/2009/oig-509.pdf.

[26] *See* http://www.sec.gov/news/studies/2009/oig-509.pdf.

entry provided little information about the nature of the inquiry other than the keywords "Investment Adviser" and "Fail to Registr (BD/IA/IC/ETC)." *Id*. The OIG was therefore unable to determine whether records were created or destroyed in connection with this MUI. Another MUI, MNY-01596, Trading In Certain Securities, opened on November 24, 1992, listed Bernard Madoff as a "Related Name" and appeared from the NRSI database entry to be an insider trading MUI. NRSI Enforcement Detail, MNY-01596, attached as Exhibit 74. The NRSI entry noted, under "Related Matters," the NY-6066 King Arthur investigation and then noted "MUI to Investigation." *Id*. However, the NRSI entry also noted that this MUI was closed on January 24, 1994, as "Inappropriate for Enforcement Action," so it is unclear whether or not this MUI became part of the NY-6066 King Arthur investigation. *Id*. It is also unclear from this NRSI entry whether any records were generated in connection with this MUI. *Id*. No Enforcement staff is listed in the NRSI entry for this MUI (apart from the Director of NYRO, whose name was listed merely because he was the current head of the office.) *Id*.

However, notwithstanding these instances of record destruction in connection with MUIs that were closed without becoming investigations, the OIG is not aware of a particular investigation that was hampered by the destruction of records for a MUI, although the OIG has not conducted an exhaustive audit or review of the potential impact on Enforcement investigations of the destruction of MUI documents over the years.[27] Enforcement Director Robert Khuzami stated in a September 14, 2011 letter to Senator Charles Grassley:

> We do not believe that current or future investigations have been harmed by the Division's old MUI retention guidance. We believe the electronic MUI information that we retain allows staff to "connect the dots" between current and closed matters . . . [I]t is less likely that significant information would have been obtained in a MUI that would be both important to a current matter and not available either from the staff who handled the closed MUI, other internal SEC information resources, or third parties.

Exhibit 50 at 3.[28]

[27] As discussed above, the OIG found the information contained in the SEC's electronic NRSI and HUB databases concerning MUIs to vary from entries with mere skeletal information about a particular MUI to entries with detailed descriptions of the issues and investigative steps for a particular MUI.

[28] In light of the destruction of records for MUIs and the absence of more detailed electronic or other data for many of these MUIs, it would be very difficult for an OIG audit to attempt to reconstruct all prior Enforcement MUIs and investigations to determine whether, and to what extent, investigations or MUIs were hampered by the destruction of MUI records.

III. The SEC's Response to NARA Regarding its Destruction of Records Related to Closed MUIs was Incomplete

A. On July 29, 2010 NARA Sent the SEC a Letter Seeking a Written Report Concerning its Past Destruction of MUI Records

As discussed in Section I.F. above, NARA had been informed by Flynn in June 2010 that that the SEC had been destroying records relating to MUIs for years. On July 29, 2010, the Director of the Modern Records Programs at NARA sent a letter to Walters, stating:

> We recently learned from Darcy Flynn, an attorney with your agency's Division of Enforcement, that for the past 17 years the Securities and Exchange Commission (SEC) has been destroying closed Matters Under Inquiry files, a series of records that has not yet been scheduled. It therefore appears that there has been an unauthorized disposal of Federal records.
>
> In accordance with NARA's responsibilities under 44 U.S.C. 2905, we would appreciate your looking into this. If you confirm that Federal records have been destroyed improperly, please ensure that no other such disposals take place and provide us with a written report within 30 days of the date of this letter as required by 36 CFR 1230.14 and 36 CFR 1230.16 (copy enclosed).

July 29, 2010 Letter from Paul Wester to Barry Walters, attached as Exhibit 75.

36 C.F.R. § 1230.14 states that an agency must report promptly any unlawful or accidental removal, defacing, alteration, or destruction of records in the custody of that agency to NARA, including: (1) a complete description of the records with volume and dates if known; (2) the office maintaining the records; (3) a statement of the exact circumstances surrounding the removal, defacing, alteration, or destruction of records; (4) a statement of the safeguards established to prevent further loss of documentation; and (5) when appropriate, details of the actions taken to salvage, retrieve, or reconstruct the records.

B. The Division of Enforcement Responded to NARA that it was "Not Aware of Any Specific Instances of the Destruction of Records" Related to Closed MUIs

As discussed above, NARA requested that the SEC "look[] into [whether] Federal records [had] been destroyed" in connection with closed MUI files. However, in the process of drafting a response to NARA, the SEC made no inquiries designed to address

NARA's question. Instead, the SEC's Division of Enforcement declared that it was "not aware of any specific instances of the destruction of records from any [MUIs that were closed without a subsequent formal investigation], but we cannot say with certainty that no such documents have been destroyed over the past seventeen years."

As discussed in detail below, various drafts of the response to NARA acknowledged that the closed MUI files at issue often included correspondence records and admitted that the staff routinely destroyed these files, including records. However, the final response to NARA did not include any such acknowledgement.

Flynn initially drafted an SEC response to this NARA letter and circulated it to ENF4 Storch, and SEC2 on August 3, 2010. August 3, 2010 E-mail from Darcy Flynn to Adam Storch, attached as Exhibit 76. Flynn's draft response included an acknowledgment that MUI records had been destroyed as follows:

> MUI records typically include correspondence, interagency memoranda, and exculpatory documents, if any, supporting a decision not to open a formal investigation. On average, a MUI consists of 1/10 box of records plus about 3 boxes of pre-deliberative, non-record information, primarily in the form of documents produced to the staff. From January 1, 2008?? to July 20, 2010, approximately 600 MUIs were closed and both the non-record information and the records were discarded for about all but a few them.

Id.

ENF4 responded via e-mail to Flynn's draft response:

> I would really like to discuss before anything goes out. Our treatment of MUI records and Investigative records has always been consistent with our understanding of our agreements with NARA. My understanding is that MUI records were treated as a sub-set of Investigative records, and, in the rare instances in which Category A-E records were obtained (usually because testimony was taken, which is no longer allowed), those records were in fact retained at closing. To the extent that any confusion was introduced by the drafting of a revised retention schedule that specifically refers to MUIs, that should not be taken as a basis for concluding that any official records were improperly destroyed.

Id. ENF4 acknowledged in his OIG testimony that he "had no direct knowledge" to support his assertions in his e-mail that it was "rare" for closed MUI files to include

Category A-E records and that in those rare instances the records were retained. [ENF4] Testimony Tr. at 50-51.

Flynn responded to [ENF4] Storch, and [SEC2] in an e-mail:

> Seems to me that we (ENF) overlooked one thing: that just about every MUI (not just rare ones) contain Category A-E records. Namely: Category B correspondence. If we agree on that, the simplest, most straight forward way to move forward is to say so and, hopefully, be done with it.

Exhibit 76. Flynn testified that none of the recipients of this e-mail substantively addressed his point that MUIs frequently contain Category B correspondence. Flynn Testimony Tr. at 132. [SEC2] testified that she "honestly [did not] know" whether MUI files had frequently contained Category B correspondence. [SEC2] Testimony Tr. at 48. Storch similarly testified that he did not know whether Flynn's statement was accurate or not. Storch Testimony Tr. at 58-60. Storch also testified that he did not believe that anyone involved in drafting the response to NARA made any effort to determine whether Flynn's statement was accurate.[29] *Id*. [ENF10] recalled correspondence being "one of the concerns that we all had about the treatment of MUI documents . . . . I mean, we talked earlier about there could be transcripts. I mean, I think that's very unusual and probably unlikely. But the correspondence would be more likely to be included in a MUI file." [ENF10] Testimony Tr. at 39-40.

On August 11, 2010, Flynn, [ENF4] and Storch participated in a meeting or a conference call organized by Storch to discuss the SEC's response to NARA's letter. August 10, 2010 E-mail from Adam Storch to [ENF4] [ENF4] attached as Exhibit 77; Notes from August 11, 2010 Meeting, attached as Exhibit 78. Notes taken by Flynn contemporaneously at this meeting state, "My concern – If we say 'That's true,' may be other fallout for Commission. Misdemeanor." Exhibit 78. Flynn testified that these notes referred to a statement made by [ENF4] during the discussion. Flynn Testimony Tr. at 68, 106. [ENF4] testified that he did not know if he made that statement, but "that would be my concern, yes, that if we agreed that – that if it's true that we're destroying unscheduled records, then, yes, that could lead to criminal penalties. . . . yes, that was a concern." [ENF4] Testimony Tr. at 54.

On August 12, 2010, Flynn sent proposed language to [ENF4] Storch, and [SEC2] to be included in the NARA response, including the statement that, "The one document category that is discarded in MUIs and that is retained in investigations is external correspondence with outside parties," but arguing that such correspondence is "pre-

[29] [ENF10] [ENF4] Walters, Storch, and [SEC2] all testified that they did not recall there being any effort by the SEC to look to determine whether any records were destroyed in connection with MUIs in July or August of 2010, prior to sending this letter to NARA. [ENF10] Testimony Tr. at 48; [ENF4] Testimony Tr. at 89; Walters Testimony Tr. at 71; Storch Testimony Tr. at 100; [SEC2] Testimony Tr. at 64.

deliberative, non record material." August 13, 2010 E-mail from Darcy Flynn to [redacted] attached as Exhibit 79. Storch and [redacted] recommended that this statement not be included in the letter to NARA. *Id*. On August 16, 2010, Storch circulated a new draft response to Walters and [redacted] which did not include the statement in Flynn's draft about MUI records typically including correspondence. August 16, 2010 E-mail from Adam Storch to Barry Walters, attached as Exhibit 80. On August 19, 2010, [redacted] commented on this draft as follows:

> Barry [Walters] and I have reviewed and discussed the draft response to the National Archives letter. The National Archives position is that there has been unauthorized disposal of Federal records. It is not clear to us from this draft if the Division of Enforcement is denying or admitting that unauthorized disposal occurred. If unauthorized disposal occurred then the response must include the information required in 36 CFR 1230.14(a)1-5, a copy of which was included with the letter.

Id. In response to [redacted] e-mail, Storch sent an e-mail to Flynn, [redacted] and [redacted] stating, "We should discuss live . . . ." *Id*. Storch then asked [redacted] to "fill in [redacted] [redacted] on this situation." August 19, 2010 E-mail from Adam Storch to Darcy Flynn, attached as Exhibit 81. During his OIG testimony, [redacted] agreed that [redacted] assessment of Storch's draft "was a fair characterization of this [draft] letter. . . . I don't think it's clear." [redacted] Testimony Tr. at 24. Storch also forwarded [redacted] response to Heslop, writing, "Did you see the response Barry [Walters] and [redacted] [redacted] sent me today?" August 19, 2010 E-mail from Adam Storch to Jeffery Heslop, attached as Exhibit 82.

On August 23, 2010, Storch, [redacted] [redacted] Flynn, and possibly [redacted] participated in a discussion regarding the response to NARA and the concern raised by [redacted] and Walters that the draft response did not admit or deny that destruction of records had occurred. Exhibit 68. Flynn's notes indicated that during this discussion Storch estimated "18K MUIs [had been] destroyed." *Id*. Flynn's notes also indicated that Storch asked [redacted] "Would you feel comfortable saying we 'deny'?" *Id*. According to these notes, [redacted] responded, "6 mo ago – of course. Now – confusion." *Id*. [redacted] testified that he did not recall making this statement, but that, "[Y]es, I would have been much firmer in a response six months before we got" the letter from NARA, "and yes, we needed to re-think where we were." [redacted] Testimony Tr. at 62.

Flynn's notes also indicated that Storch raised the question of "[w]ho should respond. Implications to admit what was destroyed. Not wise for me to take on exposure voluntarily. If this leads to something – rings in my ear – Barry [Walters] said this is serious – could lead to crim. liab." Exhibit 68. According to Flynn's notes, [redacted] stated, "I wanna do research on this provision. Any prosecutions under this?" *Id*. When asked whether anyone at the SEC expressed concern that the SEC was going to be in

some sort of trouble for having destroyed documents for many years, ENF10 testified, "Yes. Yes. . . . I think it's a violation of a federal law to destroy documents. . . . I can't recall ENF4 [ENF4 saying anything to that effect, but I'm sure that he did. I talked to Adam [Storch] about it. I'm sure that he was very concerned." ENF10 Testimony Tr. at 22-23. Heslop testified that he did not recall Storch or anyone else expressing concerns about liability if the SEC admitted to the destruction of records, but that "I think there was a conversation about, gee, is this going to be embarrassing or not." Heslop Testimony Tr. at 36.

Finally, Flynn's notes indicated that Storch stated at one point during this discussion that he was "getting concerned" about the working relationship with Walters and SEC1 "based on (1) their response (2) in writing. I plan on talking to Jeff Heslop, Barry's boss," and at another point stated, "I'm gonna touch base w[ith] Jeff [Heslop], have good rel[ations] w[ith] him, he's aware of difficulties w[ith] Barry [Walters] + SEC1 [SEC1 Exhibit 68.

The next day, August 24, 2010, another meeting or conference call was held, attended again by Storch, ENF10 ENF4 and Flynn, but this time also by Walters and SEC1 Notes of an August 24, 2010 Meeting, attached as Exhibit 83. During that meeting, ENF4 explained to SEC1 and Walters that "it would have been unusual but not impossible" for Category A though E materials to have been generated in the course of a MUI, and that there should not have been correspondence generated in the course of a MUI because MUIs usually did not "reach that level of complexity." SEC1 Testimony Tr. at 90-96, 111-113; *see also* Exhibit 83 (According to Flynn's notes of that meeting, ENF4 stated, "Division has always believed – for 20 yrs – unless testimony, other stuff – would not fall into categories."). Based upon that explanation by ENF4 (which was not accurate, as explained in Section II above), Walters and SEC1 advised that Enforcement could respond to NARA by stating that they had no knowledge that MUI records were destroyed but could not say for a fact that such destruction had never occurred. SEC1 Testimony Tr. at 90-96, 111-113. SEC1 testified that this advice was "based on what they had told me in what I thought was good faith," and that ENF4 assertion that it would have been unusual for MUIs to generate Category A through E records "made perfect sense to me not knowing the process." *Id*. at 93-95.

After the August 24, 2010 meeting with SEC1 and Walters, the draft response to NARA was further revised by ENF4 and ENF10 on August 24, and 25, 2010, with input from Storch and Flynn. August 24, 2010 E-mail from ENF4 ENF4 to ENF10 ENF10 attached as Exhibit 84; August 24, 2010 E-mail from ENF10 ENF10 to ENF4 ENF4 attached as Exhibit 85; August 25, 2010 10:12 a.m. E-mail from ENF10 ENF10 to Adam Storch and ENF4 ENF4 attached as Exhibit 86; August 25, 2010 12:41 p.m. E-mail from ENF10 ENF10 to Adam Storch and ENF4 ENF4 attached as Exhibit 87; August 25, 2010 E-mail from Darcy Flynn to ENF10 ENF10 attached as Exhibit 88.

On August 25, 2010, ENF10 circulated a draft to Storch and ENF4 on August 25, 2010, with an accompanying e-mail by ENF10 stating, "For your review and comment.

I've tried to capture what we discussed yesterday." Exhibit 86. This is the first draft response found by the OIG investigation that included the statement:

> [T]he Division [of Enforcement] is not aware of any specific instances of the destruction of records subject to the twenty-five year retention requirement from any other MUI (i.e. a MUI that was closed without a subsequent formal investigation), but we cannot say with certainty that no such documents have been destroyed over the past seventeen years.

Id.

On August 25, 2010, Storch sent a draft response to Heslop for him to review, writing in an accompanying e-mail, "Please let us know if you have any questions or comments." August 25, 2010 E-mail from Adam Storch to Jeffery Heslop, attached as Exhibit 89. Heslop responded later that day, "Looks pretty tight to me . . . from a layman's perspective I'd be hard pressed to argue with the response. I'm meeting with Barry [Walters] @ 9 tomorrow, will circle back if there are objections." *Id.* (ellipses in original).

Also on August 25, 2010, ENF4 sent a draft response to Walters and SEC1 August 25, 2010 E-mail from ENF4 ENF4 to Barry Walters, attached as Exhibit 90. The next day, August 26, 2010, a couple of hours after Walters' scheduled meeting with Heslop, Walters wrote in an e-mail, "Looks good . . . ." *Id.* Among Walters' comments was the suggestion to delete a statement that ENF10 had added to an earlier draft that, "For any MUI that was closed, but not closed into a formal investigation, staff would typically destroy any documents in the MUI file upon closing the matter." *Id.*

ENF4 incorporated Walters' suggested changes into the draft SEC response to NARA, including the deletion of that statement. *Id.* ENF10 then circulated a final draft response to Heslop, Walters, SEC1 Storch, SEC2 ENF4 and Flynn, stating, "We believe it incorporates the substance of Barry's comments. Please let me or ENF4 [ENF4 know if you have any additional questions or comments." August 26, 2010 E-mail from ENF10 ENF10 to Jeffery Heslop, attached as Exhibit 91.[30] The next day, on August 27, 2010, Walters responded, "Great, let's sign and send." *Id.* Later that day, ENF10 signed and sent the SEC's response to NARA. August 27, 2010 Letter from ENF10 ENF10 to Paul Wester, attached as Exhibit 92.[31]

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[30] SEC2 SEC2, testified that she played no role in the drafting or editing of the SEC's response to the July 29, 2010 NARA letter. SEC2 Testimony Tr. at 36, 52.

[31] 36 C.F.R. § 1230.14 states that an agency report of unlawful or accidental destruction of records must be submitted or approved by the individual authorized to sign records schedules. SEC1 testified that he had no idea why the letter was not signed by himself, Walters, or SEC3 SEC1 Testimony Tr. at 109-110. Similarly, Walters testified that he did not know why Enforcement signed the letter to NARA instead of

The entirety of the SEC's August 27, 2010 letter to NARA was as follows:

> This is in response to your letter of July 29, 2010, to Barry D. Walters, the Commission's Chief Freedom of Information and Privacy Act Officer. In your letter, you ask that Commission staff look into the disposition of files related to Matters Under Inquiry (MUI), to confirm whether there has been an unauthorized disposal of MUI files.
>
> As an initial matter, there appears to be some confusion regarding the nature of a MUI and the materials that would normally be found in a MUI file. The MUI system was originally created as an electronic database for tracking preliminary investigations, to avoid duplication of effort by the Commission's investigative staff. Over time, Enforcement staff began to use the term MUI to refer to a preliminary investigation, or the period of investigation prior to an investigation. While staff would generate and collect materials during the preliminary stages of an investigation, those materials would typically consist of background information that would not normally be included in the case file.
>
> In response to your request, we have reviewed this matter and confirm our understanding of the following: (i) the Division of Enforcement has retained electronic records relating to the opening and closing of the MUIs in question; those records are stored in the Commission's investigative case and action tracking system ("CATS"), (ii) the Division has retained, consistent with the applicable record retention schedules approved by NARA, records from any MUI that was subsequently closed into a formal investigation, and

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someone in the Records Management group. Walters Testimony Tr. at 58. ENF10 testified that he did not recall how it was decided that he was to sign the letter, but that, "I'm in the Office of Chief Counsel. If there was a chief counsel at that time who was actively engaged, it would make sense for it to come from that person." ENF10 Testimony Tr. at 44. Storch testified, "Right off the bat it was very clear that Barry [Walters] thought that Enforcement should sign off on a letter. I'm not sure why he thought that way." Storch Testimony Tr. at 87. Heslop testified that it "may have been the case" that Walters wanted Enforcement to sign the letter to NARA instead of his Records Office because Walters did not necessarily agree with the letter, and that Walters "might have" still had some concerns about the letter. Heslop Testimony Tr. at 30-31. Heslop testified, "I think [Walters] felt like he needed to follow the letter. And I don't know if the [sic] was a law or the reg code or federal regulations. And he may have felt uncomfortable signing it because it might not have. I don't really recall it precisely." *Id*. at 31.

> (iii) the Division is not aware of any specific instances of the destruction of records from any other MUI (i.e., a MUI that was closed without a subsequent formal investigation), but we cannot say with certainty that no such documents have been destroyed over the past seventeen years. However, the Division has taken steps described below to ensure that no MUI records are destroyed while we review this issue and revise our retention schedule.
>
> As you know, we are currently in the process of reviewing and updating our current retention schedule. In doing so, our principal goal is to adopt clear guidelines and procedures regarding the retention of the Division's files, including MUI files. In particular, we have sought to clarify the distinction between preliminary and formal investigations and documents generated or obtained in those investigations, and to establish distinct schedules for both. In connection with our review, on July 21, 2010, we directed our staff to retain all MUI records pending NARA approval of a revised retention schedule. The documents subject to this hold include any correspondence, interagency memoranda or other documents supporting a decision not to open a formal investigation.
>
> Please do not hesitate to contact me if you have any questions or wish to discuss this further. We look forward to working with you and your staff on the revisions to our document retention schedule.

Id.

C. The Response to NARA Did Not Comply with Federal Regulations

36 C.F.R. § 1230.14(a) states that an agency report of any unlawful or accidental removal defacing, alteration, or destruction of records in the custody of that agency to NARA must include "a complete description of the records with volume and dates if known" and "a statement of the exact circumstances surrounding the removal, defacing, alteration or destruction of records."

NARA stated to the OIG in a written opinion that it did not receive this specific information in the August 27, 2010 letter from the SEC. Exhibit 52 at 2. In addition, NARA Archivist [redacted] who participated in NARA's review of the SEC's records retention schedule, stated in an OIG interview that she personally did not think the SEC's August 27, 2010 letter to NARA satisfied the legal requirement that an agency report of any unlawful or accidental removal defacing, alteration, or destruction of

records in the custody of that agency to NARA must include "a complete description of the records with volume and dates if known" and "a statement of the exact circumstances surrounding the removal, defacing, alteration or destruction of records." Arc1 Interview Memorandum.

ENF4 testified that the SEC did not report a complete description of the records unlawfully or accidentally destroyed or a statement of the exact circumstances surrounding the destruction of such records. ENF4 Testimony Tr. at 78. Walters acknowledged in testimony that the SEC's letter to NARA clearly did not comply with 36 C.F.R. § 1230.14. Walters Testimony Tr. at 70. Although Storch repeatedly testified that the SEC's intent was to be "fulsome and to be transparent with NARA" in the SEC's response to NARA's July 29, 2010, he acknowledged in testimony that he did not believe that the SEC's letter to NARA provided a complete description of the records and volumes and dates, if known, and a statement of the exact circumstances surrounding the removal, defacing, alteration, or destruction of records, as required by 36 C.F.R. § 1230.14. Storch Testimony Tr. at 104-05, 107-08.

D. The Response to NARA Omitted Pertinent Information

The SEC's response to NARA's July 29, 2010 letter omitted information important to understanding the scope and nature of the issue relating to the destruction of MUI records. In particular, the SEC was aware of several facts that it could have included in its response that were contrary to the SEC's statement that "the Division [of Enforcement] is not aware of any specific instances of the destruction of records from any other MUI (i.e., a MUI that was closed without a subsequent formal investigation), but we cannot say with certainty that no such documents have been destroyed over the past seventeen years."[32]

1. The SEC's Response Omitted the Fact that it Had Been Enforcement's Policy to Destroy All Documents Upon Closing a MUI

As discussed in Section I.B. above, the SEC's longstanding written policy prior to July 20, 2010, had been to destroy all documents relating to MUIs. This policy was understood by officials within and outside Enforcement, including the drafters and reviewers of the SEC's response to NARA. *See* Section I.B. *infra*. Moreover, a draft

[32] The SEC's August 27, 2010 letter to NARA also stated, "While staff would generate and collect materials during the preliminary stages of an investigation, those materials would typically consist of background information that would not normally be included in the case file." Exhibit 92. In light of the OIG's finding of numerous instances of non-"background information" such as document requests and other correspondence being generated in the course of MUIs, as discussed in Section II above, it may have actually been relatively common for non-"background information" to be generated in MUIs. However, in light of the ambiguity of this statement as to what "typically" meant, and as to whether "consist" was meant to imply that MUIs consisted solely of background information, the OIG cannot conclude that this statement was materially false.

response stated, "For any MUI that was closed, but not closed into a formal investigation, staff would typically destroy any documents in the MUI file upon closing the matter." Exhibit 88. This statement was not included in the final response sent to NARA. Exhibit 92. ENF4 Storch, ENF10 Walters, SEC1 and Heslop, all of whom were involved in drafting or reviewing the SEC's August 27, 2010 letter to NARA, were all aware that it had been the SEC's policy to destroy documents upon closing MUIs, as evidenced, among other things, by their involvement in the discussion over how and when to change this policy in June and July of 2010, as discussed in Section I.G., above. ENF4 Testimony Tr. at 8, 11-12; ENF10 Testimony Tr. at 12-13, 47; Heslop Testimony Tr. at 25, 32-33; Walters Testimony Tr. at 61 ("[B]ased on everything that had occurred now over, I think, two months of these conversations going back and forth, people were saying that these [MUI] records had been destroyed for 17 years."); Storch Testimony Tr. at 15-16 ("[A]s I understood it at the time, . . . the case closing guidance that existed on EnforceNet made it very clear that once a MUI is closed, documents related to those MUIs . . . could be and should be destroyed after a MUI was closed.").

ENF10 acknowledged in testimony that it was possible that NARA would get the impression from the SEC's letter that perhaps there were no documents destroyed upon closing MUIs. ENF10 Testimony Tr. at 48. ENF10 testified that he was aware that a MUI file, during the preliminary stages of an investigation, may include correspondence or other documents that would not be considered background information. *Id*. at 51-52.

ENF4 testified that the statement in the letter that the Division is not aware of any specific instances of the destruction of records from any other MUI "can be read in a way that it would not be accurate." ENF4 Testimony Tr. at 75. ENF4 acknowledged in his testimony that, prior to the July 20, 2010 guidance being sent to the Enforcement staff, the Enforcement staff would have routinely destroyed MUI documents. *Id*. at 44.

2. The Division of Enforcement was in Fact Aware of Specific Instances of the Destruction of Records

Despite the statement in the SEC's August 27, 2010 response letter that "the Division is not aware of any specific instances of the destruction of records from any other MUI (i.e., a MUI that was closed without a subsequent formal investigation), but we cannot say with certainty that no such documents have been destroyed over the past seventeen years," the Division of Enforcement was aware of at least one specific instance of the destruction of records from a MUI that was closed without a subsequent formal investigation.

As discussed in Section II above, staff attorney ENF6 ENF6 who is part of the Division of Enforcement,[33] was aware of the destruction (in accordance with

[33] SEC2 testified that she understood "the Division," as used in this August 27, 2010 SEC letter, to refer to "the Enforcement program." SEC2 Testimony Tr. at 64. Storch testified that "it appears as

Enforcement policy at that time) of records in connection with a MUI that she closed in July 2010.[34] A few minutes after the July 20, 2010 guidance was sent to the Enforcement Division staff [redacted] sent an e-mail to [redacted] stating: "I received approval to close a MUI last week and I shredded the documents and deleted e-mails yesterday (Monday). Is that a problem?" July 21, 2010 E-mail from Barry Walters to Jeffery Heslop, attached as Exhibit 93. [redacted] concerned that the destruction of MUI records might have occurred, immediately forwarded [redacted] e-mail to [redacted] who then forwarded the e-mail to Walters. *Id.*; [redacted] Testimony Tr. at 19. The next day, on July 21, 2010, Walters sent [redacted] e-mail to Heslop, marked with "High" importance, in which he wrote:

> ISSUE: destruction of records related to Matters Under Investigation (MUIs) by the Enforcement Division.
>
> RECENT HISTORY: [redacted] issued guidance to the Enforcement Division on 6/16 to stop destruction of MUI-related documents. . . . Sometime between approx 6/16 and 6/24, Darcy Flynn, an Enforcement Division attorney, called NARA directly to discuss the issue and apparently admitted that the SEC had been destroying these records for years. . . .
>
> After the [July 20, 2010 Enforcement-wide MUI retention] notice was sent, Records Management received the e-mail from [redacted] stating that she destroyed MUI-related documents and emails on 7/19. . . .
>
> RECOMMENDATION: At this point I think we should ensure that Rob Khuzami has been made aware of this matter, and that you mention it briefly to the Chairman during your Friday meeting. If you agree, let's discuss options for getting Khuzami in the loop.

Exhibit 93.

Heslop then forwarded this string of e-mails, including those of Walters and [redacted] concerning the destruction of MUI documents, to Storch on July 21, 2010, explaining to Storch that the e-mail "was meant for internal use, and Barry would probably shoot me if he thought I sent it . . . ." *Id.*; July 21, 2010 E-mail from Jeffery Heslop to Adam Storch, attached as Exhibit 94. Heslop testified that he sent this to Storch because, "I wanted Adam [Storch] to be aware of the fact that, you know, this is getting bigger than I think I

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though the letter is representing the Division of Enforcement's views, not a specific person or persons." Storch Testimony Tr. at 97.

[34] As discussed in Section II above, this is not the only instance of MUI record destruction that the OIG investigation has found.

certainly had possibly imagined at the time. . . . I wanted Adam [Storch] to have full transparency into the background that was going to involve his boss and potentially congressional notification." Heslop Testimony Tr. at 22.[35] Storch responded to Heslop via e-mail, "After reading the email, I think its best that we discuss live." Exhibit 94.

Storch forwarded this string of e-mails, including those of Walters and ENF6 concerning the destruction of MUI documents, to SEC2 warning, "Do NOT share this with anyone. [Heslop] sent this to me in confidence." Exhibit 93.[36] SEC2 responded to Storch via e-mail, "Interesting what some people take away from situations like these . . . ." *Id*. (ellipsis in original). Storch then wrote to SEC2 via e-mail, "I am going to talk with Jeff [Heslop] tomorrow live. I appreciate that he shared this with me. Let's [sic] us know what we're dealing with . . . ." *Id*.[37] (ellipsis in original).

Even when Enforcement officials such as Storch were made aware in July 2010 that staff attorney ENF6 had raised concern about her recent destruction of MUI documents, no effort was made to verify whether these documents were records that needed to be maintained.[38]

ENF10 testified that he had never seen ENF6 e-mail about her shredding of documents and deletion of e-mails, and that he did not recall having any understanding that ENF6 or any other Enforcement attorney being concerned about having destroyed MUI documents. ENF10 Testimony Tr. at 19-20. He also testified, however, that he would not be surprised if she had such a concern, since it was Enforcement's policy prior to July 20, 2010 to destroy MUI documents. *Id*. When asked whether the Division of Enforcement was aware of the specific instance that ENF6 destroyed records, ENF10 testified, "Yeah. . . . [I]t's hard to say that we didn't know about that. . . . [T]he ENF6

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[35] Heslop testified that he did not speak with Khuzami about the issue of MUI records, and that he did not know whether anyone else did. Heslop Testimony Tr. at 23.

[36] SEC2 testified:

> [I]f I remember correctly, I actually asked Darcy [Flynn] to follow up with ENF6 [ENF6 when I got this email from Adam [Storch] and said, you know, 'Can you get an understanding? Do we actually – did she destroy something that would have been considered A through E?' And Darcy got back to me, and said, 'No, it would have fallen underneath the normal records retention policy that we had prior to the guidance being sent out.'

SEC2 Testimony Tr. at 47. However, ENF6 testified that she has never had any communications with Flynn or SEC2 about this MUI, and Flynn stated to the OIG in an interview that he never spoke with ENF6 or SEC2 about ENF6 e-mail or the issue it raised concerning the destruction of documents for her MUI. ENF6 Testimony Tr. at 19-20; Flynn Interview Memorandum.

[37] Heslop testified that he did not recall a conversation with Storch around this time, but that "[i]f he said he was going to talk to me the next day, I assume he did." Heslop Testimony Tr. at 24.

[38] As discussed in Section III.B., above, several of the Enforcement staff involved in drafting the letter to NARA were aware that ENF6 had recently destroyed documents related to a particular MUI, and none of those staff made any effort to determine whether some of those documents had been records.

ENF6 instance, that's a specific instance and it's hard to say that we didn't know of that." ENF10 Testimony Tr. at 45-47. ENF10 testified further that "[W]e didn't know what was in the files that were destroyed by ENF6 [ENF6 . . . We probably should have gone back and checked before making a statement [to NARA]." ENF10 Testimony Tr. at 45.[39]

NARA Archivist Arc1 Arc1 stated that she was not aware that an SEC staff attorney sent an e-mail in July 2010 to the SEC's SEC3 in which the staff attorney stated that she had closed a MUI the previous week and disposed of the documents and e-mails relating to the MUI. Arc1 Interview Memorandum. Arc1 stated that she "absolutely" would have wanted to know that an SEC staff attorney had recently disposed of documents and e-mails related to a closed MUI. *Id*. Arc1 stated to the OIG concerning the SEC's August 27, 2010 letter, "Ideally, we would have liked something more forthcoming. It was kind of 'lawyerese.'" *Id*.

The Chief Records Officer for NARA stated in a written opinion to the OIG that, "Based on the investigative information provided in your letter, it does appear that the statement [that 'the Division is not aware of any specific instances of the destruction of records from another MUI, but we cannot say with certainty that no such documents have been destroyed over the past seventeen years . . .'] was inaccurate or misleading." August 31, 2011 Letter from Paul Wester to David Kotz, attached as Exhibit 52, at 2.

Notes taken at other August 2010 meetings, discussed in Section III.B., above, indicated that Enforcement may have been motivated to exaggerate the unlikelihood of records being destroyed in the course of a MUI for fear of criminal exposure for the SEC. *See* ENF4 Testimony Tr. at 54 ("that would be my concern, yes, that if we agreed that – that if it's true that we're destroying unscheduled records, then, yes, that could lead to criminal penalties. . . . yes, that was a concern."); ENF10 Testimony Tr. at 22-23 (when asked whether anyone at the SEC expressed concern that the SEC was going to be in some sort of trouble for having destroyed documents for many years, "Yes. Yes. . . . I think it's a violation of a federal law to destroy documents. . . . I can't recall ENF4 [ENF4 saying anything to that effect, but I'm sure that he did. I talked to Adam [Storch] about

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[39] ENF10 in a written statement provided to the OIG after his testimony, stated that "I did not intend for the letter to National Archives to create the impression that the Division had not disposed of MUI documents in the past." August 9, 2011 E-mail from ENF10 ENF10 attached as Exhibit 105. ENF10 further stated:

> [W]e did not believe that we could provide the National Archives with the detailed information regarding the past disposal of MUI documents required under the regulations in the short amount of time allowed for a response. But I also expected that the response to the National Archives letter would result in further discussions (likely many discussions) with the National Archives regarding a number of issues, but including the past disposal of MUI documents.

Id.

it. I'm sure that he was very concerned."). Heslop testified that he could not say that the Enforcement Division in its letter to NARA was trying to hide the fact that they were destroying documents, but that "I think they were trying to cautiously word it for whatever, you know, reasons it might have motivated them. Again, I think the embarrassment factor was the one that I recall being, you know, on the table." Heslop Testimony Tr. at 38.

E. NARA Remains Concerned about Enforcement's Disposition of MUI Records

A letter dated September 29, 2010 from NARA to Walters acknowledged the SEC's August 27, 2010 letter to NARA. September 29, 2010 Letter from Paul Wester to Barry Walters, attached as Exhibit 95. The letter stated:

> We are satisfied that the Division of Enforcement has taken the necessary steps to prevent any future unauthorized destruction of electronic and/or textual Matters Under Inquiry (MUI) files. . . .
>
> However, in accordance with NARA's responsibilities under 44 U.S.C. 2905, we remain concerned. The Matters Under Inquiry (MUI) definition and description remain indeterminate. These files are incompletely defined, unscheduled, and so remain at risk. Consequently, we will maintain the unauthorized destruction case of the Matters Under Inquiry (MUI) files as open until these records are covered by a records control schedule signed by the Archivist of the United States.

Id. Upon reviewing this letter, ENF10 wrote in an e-mail to Storch, "I think that this is probably the best response we could have expected under the circumstances, but let me know if you have concerns or want to discuss." October 14, 2010 E-mail from ENF10 ENF10 to Adam Storch, attached as Exhibit 96. Storch responded via e-mail, "Very good response – thanks for helping us with this." *Id.*

In an August 31, 2011 letter to OIG, the Chief Records Officer for NARA stated:

> NARA's remaining concerns relate to the uncertainty as to whether MUI records are synonymous with preliminary investigations, or, in the alternative, lack a NARA-approved records disposition authority covering these records. As we have communicated to the SEC records management staff, they must clarify this issue for us and take appropriate action to either create a new schedule for

> these records or propose a revision to one or more existing schedules.

August 31, 2011 Letter from Paul Wester to David Kotz, attached as Exhibit 52.

SEC2 testified that, going forward, the SEC plans to retain all MUI documents falling into Categories A through E, and that the SEC has been in the process of drafting a new proposed records retention schedule for NARA that would include retaining these documents. SEC2 Testimony Tr. at 61-63.

However, there does not appear to have been any effort made by Enforcement to retrieve or centralize records from MUIs that have been closed prior to July 20, 2010 that still exist in individual attorneys' case files or computers and have not been sent to the Federal Records Center, as required by the current records retention schedule for Enforcement. Exhibit 34. Storch testified that he was not aware of there being any effort by the SEC, prior to news media reports in August 2011 about potential destruction of MUI records, to retrieve records that were potentially deleted as part of a MUI that was closed, or any effort to reach out to Enforcement lawyers who may have closed MUIs over prior years to try to figure out what MUI documents had been destroyed. Storch Testimony Tr. at 110.

IV. Allegations about Enforcement's Records Retention Schedule for its Investigations

On September 6, 2011, Flynn and his attorney raised new allegations that the SEC does not have authority to destroy the following three categories of documents that are often created during the course of its investigations and that are currently not scheduled: (1) documents produced by third parties; (2) internal work product; and (3) internal e-mails.[40] On September 7, 2011, an Enforcement-wide memorandum was circulated directing Enforcement staff to "retain all documents and records created, received, or maintained for all matters (including MUIs, investigations, and litigation.)" September 7, 2011 Memorandum from Mark Cahn to All Enforcement Staff, attached as Exhibit 97. Flynn's attorney also raised these allegations with NARA, prompting NARA to send a letter to Barry Walters, Director of the SEC's Office of FOIA, Records Management, and Security, on September 9, 2011, asking the SEC to:

> Review this allegation and determine whether portions of investigative case files may have been destroyed without first being reviewed in accordance with [the current

[40] In a letter dated September 19, 2011, as the OIG was nearing the completion of this investigation, Flynn's attorney raised further concerns, including whether the Enforcement staff was still routinely destroying MUI records, and whether the Enforcement staff may have routinely destroyed records during "informal investigations." In this letter, Flynn's attorney also suggested that the OIG conduct an audit of the Enforcement records keeping process. After the issuance of this report, the OIG will determine whether additional investigations or audits are warranted in light of these allegations.

> Enforcement records retention schedule.] NARA specifically asks the SEC to determine if the closed case files were reviewed by staff and the appropriate selection criteria were applied pursuant to the approved records retention schedule prior to any such destruction that may have taken place.

September 9, 2011 Letter from Paul Wester to Barry Walters, attached as Exhibit 98.

SEC1 stated to the OIG in an interview that, based upon his own review of representative material from each category, he believed that the three categories of documents at issue are not records as described in 36 C.F.R. § 1222, unless they meet the criteria for Categories A though E records of the 1993 McLucas Memorandum. SEC1 Interview Memorandum at 1, 3.

SEC1 stated in this interview that, based upon his direct communications with NARA, he understood NARA to have the same view that the three categories of documents at issue were not records. *Id*. at 1. SEC1 stated that written remarks in NARA's 1992 appraisal of the Enforcement schedule, which included a review of the 1989 Lynch Memorandum, referring to Category F documents as "miscellaneous material" also indicated that documents that do not fall into Categories A through E documents, such as third-party document production, work product, and internal e-mails, were not viewed as records by NARA. SEC1 Interview Memorandum. SEC1 also provided to the OIG an agenda from a July 16, 2010 meeting with NARA that SEC1 attended, with handwritten notes taken contemporaneously by SEC1 Notes from July 16, 2010 Meeting, attached as Exhibit 99. SEC1 stated that these handwritten notes, which are next to the item "Non-record status of unutilized background material" and which state "Cat F don't send to FRC, will fix @ FRC w/ redraft," corroborated his understanding that NARA viewed all Category F investigative material, which would include third-party document production, work product, and internal e-mails, as having "non-record status" as "unutilized background material." SEC1 Interview Memorandum at 1.

Flynn and his attorney offered as support for his assertion that it was Enforcement policy that all internal e-mails be deleted upon closing a matter, a copy of the e-mail sent to Enforcement staff upon closing an investigation that states unless there is a FOIA concern, an access request from another agency, a preservation notice, an open Congressional, Commission, or OIG inquiry, or the investigation is associated with an omnibus formal order:

> the only electronic documents that we are required to retain in this case are email correspondence with outside parties. While we are not required to retain internal emails which, along with other work product, can be deleted, retaining

> them is a permissible, and often simpler, option to sorting out internal from external emails.

August 31, 2011 E-mail from Enforcement Records Management and Disposition, attached as Exhibit 100.

However, this e-mail also refers the Enforcement staff to Section 2 of the Division's Documents and Records Disposition Procedures for Closed Cases for more information. *Id.* These Documents and Records Disposition Procedures, which are on Enforcement's intranet, state that all documents falling into Categories A through E "must be retained and sent to storage . . . . If any such Records exists only in electronic format, it can either be printed and retained in hard copy or burned to a disk and saved separately in electronic format." December 21, 2010 Documents and Records Disposition Procedures For Closed Cases, attached as Exhibit 101, at 2.

Thus, while it is Enforcement's policy for any internal e-mails that are Categories A through E records to be retained, the standard e-mail that has been sent to attorneys upon closing an investigation may not adequately describe that policy. The OIG is recommending that Enforcement review its guidance, including automatically generated e-mails, to ensure that all guidance is consistent with Enforcement's record retention policies.

Although the OIG did not find evidence substantiating the allegation that these three categories of documents have been improperly destroyed, the OIG is recommending that the SEC seek formal guidance from NARA to ensure that these documents are disposed in accordance with Federal law.[41] The OIG is also recommending that the SEC determine whether there are additional records that, while not legally required to be retained, should be retained as a matter of Enforcement program policy, to enable the Enforcement staff to understand what investigative work has been done in closed MUIs and investigations.

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[41] SEC1 stated to the OIG that he has recommended that Enforcement work product now be scheduled in a draft proposed Enforcement schedule to NARA, not because work product met the Federal definition of records, but because of the increased transparency expected by the public, including the January 21, 2009 Presidential Memorandum on Transparency and Open Government. SEC1 Interview Memorandum at 3; January 21, 2009 Presidential Memorandum on Transparency and Open Government, attached as Exhibit 102. SEC1 also stated that an agency is permitted to schedule documents for retention even if the agency is not legally required to retain the documents. SEC1 Interview Memorandum at 3. SEC1 stated that he plans to recommend that the SEC include third-party production as part of this proposed schedule as a non-record item because he wants to have an open conversation with NARA about the issue, and because he wants an explicit record if an understanding is reached with NARA that third-party production is not a Federal record and not scheduled to be retained. *Id.* On September 29, 2011, the SEC delivered a draft records schedule to NARA reflecting SEC1 recommendations. Draft Retention Schedule, attached as Exhibit 103.

V. The SEC's Destruction of MUI Records May Have Impacted its Ability to Respond to FOIA Requests

As noted in Section I.B., above, the 1993 McLucas Memorandum directed that, upon closing a "case," that the Enforcement staff retain, under Category F:

> [a]ll other case material that does not fall within categories A – E but must be held due to FOIA concerns. This category was created in order to permit the Commission temporarily to store records in the Federal Records Center that are subject to a FOIA request and that would otherwise not be retained.

Exhibit 31 at 3-4. Enforcement intranet guidance has been clear since at least as early as 2001 that, before closing an investigation, the Enforcement staff was required to confirm in writing whether there were any FOIA concerns, such as a pending FOIA request or a FOIA determination on appeal, and if so, to retain documents for the investigation in accordance with the SEC FOIA Office's guidance. *See* 2001 Case Closing Manual, attached as Exhibit 27, at 3; 2002 Case Closing Manual, attached as Exhibit 32, at 2; 2008 Case Closing Manual, attached as Exhibit 33, at 2-3. SEC4 SEC4 SEC4 stated to the OIG that the reason that Enforcement staff was required to confirm if there were FOIA concerns upon closing an investigation was that the records retention schedule for the FOIA Office required that such records be retained for six years. SEC4 Interview Memorandum; General Records Schedule 14, attached as Exhibit 104, at 3.

However, until July 20, 2010, the guidance from Enforcement stated that the Enforcement staff did not need to check for outstanding FOIA concerns before it closed MUIs and destroyed the MUI files. Exhibit 27 at 1-2; Exhibit 32 at 1-2; Exhibit 33 at 1-2. As a result, documents generated in connection with MUIs that were closed without becoming an investigation would not have been preserved even if there were outstanding FOIA concerns relating to those MUIs.[42]

CONCLUSION

The OIG investigation found that it had been the policy of Enforcement, from the point of time in which MUIs were first created in approximately 1981 until July 20, 2010, to dispose of all documents relating to a MUI that were closed without becoming investigations. According to Enforcement, between October 1, 1992, and July 20, 2010, Enforcement opened 23,289 MUIs. Of those 23,289 MUIs, 10,468 MUIs were closed without becoming an investigation or another MUI.

[42] Walters testified that before the OIG investigation he had not been aware that Enforcement staff had not been required to check for outstanding FOIA concerns before destroying documents related to closed MUIs. Walters Testimony Tr. at 76.

The OIG investigation found Enforcement's case closing manual, which had been posted on Enforcement's Intranet since at least 2001, specifically directed Enforcement attorneys, "After you have closed a MUI that has not become an investigation, you should dispose of any documents obtained in connection with the MUI." The OIG did not find evidence of an improper motive behind Enforcement's longstanding policy of destroying documents related to closed MUIs that did not become investigations although there was a lack of clarity as to the rationale for the policy.

The OIG investigation also found that the SEC's Enforcement staff destroyed documents related to closed MUIs that should have been preserved as federal records. The OIG requested from the SEC's Office of Records Management Services any records pertaining to fifteen particular MUIs spanning in time from 1993 through 2009. The Office of Records Management Services responded that it has no record of ever receiving the files for these MUIs, and that "despite an extensive search of our holds and finding aids . . . we cannot locate the material . . . ." The OIG reviewed the SEC's electronic database entries in NRSI for these MUIs, and interviewed SEC staff that had been assigned to these MUIs, in an effort to determine whether federal records had been created and whether they had been destroyed in connection with these MUIs. As a result of this review, the OIG has found several instances in which federal records were created. For example, the electronic database for a MUI relating to an investment bank, indicated that the MUI was opened in March 4, 2002, and closed on July 11, 2002, and that the MUI was opened because the SEC received an anonymous complaint from an accounting firm. The federal records created in the course of this MUI included the original complaint from the accounting firm, correspondence from the SEC requesting documents from the investment bank, and correspondence to accompany the investment bank's document production. However, notwithstanding these instances of record destruction in connection with MUIs that were closed without becoming investigations, the OIG is not aware of a particular investigation that was hampered by the destruction of records for a MUI, although the OIG has not conducted an exhaustive audit or review of the potential impact on Enforcement investigations of the destruction of MUI documents over the years.

The OIG investigation also found that in June 2010, SEC Enforcement attorney Darcy Flynn informed NARA that the SEC had been destroying records relating to MUIs for years. In response, NARA sent a letter to the SEC on July 29, 2010 asking the SEC to look into the apparent unauthorized disposal of Federal records and indicating that if the SEC "confirm[ed] that Federal records have been destroyed improperly," the SEC should "ensure that no other such disposals take place and provide [NARA] with a written report within 30 days of the date of this letter as required by" federal regulations, specifically citing 36 C.F.R. § 1230.14.

However, we found that in the process of drafting a response to NARA, the SEC made no inquiries designed to determine whether MUI records were in fact destroyed. Instead, Enforcement declared that it was "not aware of any specific instances of the

destruction of records from any [MUIs that were closed without a subsequent formal investigation], but we cannot say with certainty that no such documents have been destroyed over the past seventeen years."

We further found that the SEC's August 27, 2010 response to NARA did not comply with federal regulations as it did not provide "a complete description of the records with volume and dates if known" and "a statement of the exact circumstances surrounding the removal, defacing, alteration or destruction of records" as required by 36 C.F.R. § 1230.14. In addition, we found that the SEC's response to NARA omitted information important to understanding the scope and nature of the issue relating to the destruction of MUI records. Most significantly, the SEC's response omitted the fact that it had been Enforcement's policy to destroy all documents upon closing a MUI. Moreover, despite the statement in the SEC's August 27, 2010 response letter that "the Division is not aware of any specific instances of the destruction of records from any other MUI (i.e., a MUI that was closed without a subsequent formal investigation), but we cannot say with certainty that no such documents have been destroyed over the past seventeen years," we found that the Division of Enforcement was aware of at least one specific instance of the destruction of records from a MUI that was closed without a subsequent formal investigation.

The OIG investigation found that an Enforcement staff attorney was aware of the destruction (in accordance with Enforcement policy at that time) of records in connection with a MUI that she closed in July 2010. A few minutes after Enforcement sent Division-wide guidance on July 20, 2010 to preserve certain documents related to MUIs, the staff attorney sent an e-mail to the SEC's records office stating: "I received approval to close a MUI last week and I shredded the documents and deleted e-mails yesterday (Monday). Is that a problem?" We found that even when Enforcement officials were made aware in July 2010 that the staff attorney had raised concern about her recent destruction of MUI documents, no effort was made to verify whether these documents were federal records that needed to be maintained.

NARA Archivist Arc1 Arc1 stated that she was not aware of the SEC staff attorney's July 2010 e-mail and stated that she "absolutely" would have wanted to know that an SEC staff attorney had recently disposed of documents and e-mails related to a closed MUI. In addition, the Chief Records Officer for NARA stated in a written opinion to the OIG that, "Based on the investigative information provided in your letter, it does appear that the statement [that 'the Division is not aware of any specific instances of the destruction of records from another MUI, but we cannot say with certainty that no such documents have been destroyed over the past seventeen years . . .'] was inaccurate or misleading."

Although the OIG did not find that assistant chief counsel ENF10 the signatory to the SEC's August 27, 2010 letter to NARA, was aware at the time he signed the letter to NARA of a particular instance of the destruction of MUI records, and although he is not a records expert, ENF10 acknowledged in testimony that he was aware of the SEC's

policy to destroy documents upon closing MUIs, that he recalled being concerned that federal records could be created as part of a MUI file, and that it was possible that NARA would get the impression from the SEC's letter that perhaps there were no documents destroyed upon closing MUIs. The OIG found that ENF4 an attorney in Enforcement's Office of Chief Counsel ENF4 s in Enforcement, who played a primary role in drafting the August 27, 2010 response letter, was similarly unaware of a particular instance of the destruction of MUI records, but was well aware of the Enforcement policy prior to July 20, 2010 to destroy MUI documents upon closing, which was not revealed in the letter to NARA. The OIG further found that Enforcement Managing Executive Storch reviewed, offered edits, and participated in decisions and multiple meetings concerning the SEC's response letter to NARA, while aware that the staff attorney had recently destroyed MUI documents, that the Enforcement policy had been to destroy MUI documents, and that Flynn had noted that federal records that were required to be preserved were frequently generated in the course of a MUI. While the OIG did not find evidence that these individuals intentionally made materially false statements in the response to NARA,[43] we do find that given their roles as senior Enforcement officials and in light of the information that was available to them at the time, they should have drafted a response to NARA that was more forthcoming. Accordingly, we are referring this matter to the Director of Enforcement, for oral instruction or counseling of ENF10 ENF4 and Storch on the importance of providing full and complete responses to official requests from federal agencies like NARA.

The OIG investigation also found that, although Enforcement has destroyed, pursuant to long-time policy, three categories of documents that are currently not scheduled (documents produced by third parties, internal work product, and internal e-mails), the SEC's SEC1 has opined that these documents were not records that were required to be retained. Although it does not appear that these three categories of documents have been improperly destroyed without authority to do so, the OIG is recommending that the SEC seek formal guidance from NARA to ensure that these documents are disposed in accordance with Federal law.

We are also providing the following additional recommendations. We recommend that the Division of Enforcement: (1) take appropriate steps as necessary, including coordination with Enforcement attorneys nationwide, to determine what federal records from closed MUIs are retrievable, and ensure that any such federal records are retained in the same manner that investigative records are retained pursuant to the current

[43] 18 U.S.C. § 1001 prohibits individuals from making any materially false, fictitious, or fraudulent statement or representation. The OIG did not find reasonable grounds to believe that ENF10 who signed the SEC's August 27, 2010 letter to NARA, violated this criminal statute by knowingly and willfully making a false statement by stating that "the Division is not aware of any specific instances of the destruction of records from [a MUI that had been closed], but we cannot say with certainty that no such documents have been destroyed over the past seventeen years." As discussed above, the OIG did not find that ENF10 personally was aware of a particular instance of the destruction of MUI records.

schedule with NARA; (2) work with the SEC's Office of Records Management Services and NARA to determine which MUI and investigative records are legally required to be retained; (3) determine if there are additional federal records that, while not legally required to be retained, should be retained as a matter of Enforcement program policy, to enable the Enforcement staff to understand what investigative work has been done in closed MUIs and investigations, or for other policy reasons; and (4) review its guidance, including as it relates to automatically generated e-mails, to ensure that all guidance is consistent with Enforcement's federal record retention legal obligations.

The OIG is referring this matter to the Director of Enforcement; the Chief Operating Officer; the Deputy Chief of Staff, Office of the Chairman; the General Counsel; the Ethics Counsel; and the Acting Associate Executive Director for Human Resources, for implementation of the aforementioned recommendations. In addition, we are providing copies of this report to Commissioners Elisse Walter, Luis Aguilar and Troy Paredes, for informational purposes.

Submitted: PII [redacted] Date: 10/5/11

Concur: PII [redacted] Date: 10/5/2011

Approved: _____ Date: 10/5/11
H. David Kotz