REPORT OF INVESTIGATION

UNITED STATES SECURITIES AND EXCHANGE COMMISSION
OFFICE OF INSPECTOR GENERAL

Case No. OIG-502

Allegations of Improper Disclosures and Assurances Given

September 30, 2009

REPORT OF INVESTIGATION

UNITED STATES SECURITIES AND EXCHANGE COMMISSION OFFICE OF INSPECTOR GENERAL

Case No. OIG-502

Allegations of Improper Disclosures and Assurances Given

Introduction and Summary of Results of Investigation

On October 17, 2008, the Securities and Exchange Commission ("SEC" or "Commission") Office of Inspector General ("OIG") opened an investigation after receiving an anonymous complaint dated October 7, 2008. The complaint alleged the Division of Enforcement ("Enforcement") Director Linda Chatman Thomsen gave information to the Executive Vice President and General Counsel of JPMorgan Chase & Co. ("JPMorgan") about the state of various SEC investigations into The Bear Stearns Companies, Inc. ("Bear Stearns") during the weekend before JPMorgan acquired Bear Stearns without consulting with other Enforcement staff involved in those investigations, contrary to a policy she instituted.

The complaint further alleged that the General Counsel of JPMorgan, Stephen Cutler, Thomsen's predecessor as SEC Enforcement Director, called Thomsen "to get assurances and inside knowledge from the SEC to help Morgan's negotiating position (*i.e.*, how much to bid)."[1]

The OIG investigation determined that Thomsen had communications with Cutler that weekend, and that Cutler did seek assurances from Enforcement that JPMorgan would not be sued for the actions of Bear Stearns. However, we have found no evidence that Thomsen gave JPMorgan information about any specific investigation of Bear Stearns, or provided specific assurances that JPMorgan would not be sued by the SEC in connection with any ongoing investigation of Bear Stearns. We did find that Thomsen gave Cutler some comfort regarding the outcome of ongoing Bear Stearns' investigations and assurances that Enforcement would not recommend action against JPMorgan related to Bear Stearns' conduct during the 60 days prior to the acquisition.

---

[1] While the anonymous complaint also alleged that the inside information was critical to JPMorgan's negotiating position, the OIG found that the sale price for the $236 million Bear Stearns and JPMorgan transaction could not have been substantively affected by any pending SEC Enforcement investigations.

Our investigation also disclosed that while at least one staff member had the impression that cases related to Bear Stearns were "essentially over," we found no evidence that an investigation related to Bear Stearns was stopped or altered as a result of any communications between Cutler and Thomsen. We did find that there are senior staff within Enforcement who perceive that former high-level officials such as Cutler have greater access and influence with the Division of Enforcement.

The OIG also found that Thomsen did not consult with any other Enforcement staff that weekend, as alleged in the complaint. Although technically not required by Enforcement's policy on external communications, in our view, the inclusion of other Enforcement staff, such as the Deputy Director of Enforcement, in the deliberative process and in any communications with Cutler would have avoided an appearance of impropriety stemming from Thomsen's close relationship with Cutler.

The OIG also found that Thomsen and the Office of General Counsel did not obtain formal Commission approval before making any critical determinations about the viability of future Enforcement investigations. While we did not find any SEC rule or policy that mandated formal Commission approval, we recommend that the circumstances in which Commission approval is required should be clarified so that SEC senior staff are aware of their authority when making decisions that may bind future Commissions.

We also found that Enforcement's letter to JPMorgan that weekend technically disclosed non-public information because it confirmed that there were ongoing investigations into Bear Stearns. The OIG investigation revealed that the Office of General Counsel reviewed and approved that letter before it was sent. We did not find that this disclosure was improper *per se* because the rules allow for discretion in extraordinary circumstances for non-public information to be disclosed. However, there are also serious questions about the propriety of making this letter publicly available without approval of the entire Commission and in general, we found a lack of clarity with respect to the agency rules and guidelines relating to the disclosure of non-public information, which we recommend be immediately addressed.

b6, b7c [redacted]

This document is subject to the provisions of the Privacy Act of 1974, and may require redaction before disclosure to third parties. No redaction has been performed by the Office of Inspector General. Recipients of this report should not disseminate or copy it without the Inspector General's approval.

Scope of Investigation

The OIG obtained and reviewed thousands of e-mails of relevant SEC staff as well as numerous other documents related to this matter, including staff notes.

The OIG took sworn, on-the-record testimony of the following current or former SEC employees:

(1) Stephen Cutler, Executive Vice President and General Counsel of JPMorgan Chase and former Director, Division of Enforcement (March 11, 2009);

(2) Linda Chatman Thomsen, former Director, Division of Enforcement (May 11, 2009);

(3) Erik Sirri, former Director, Division of Trading and Markets (April 21, 2009);

(4) Brian Cartwright, former SEC General Counsel (January 27, 2009);

(5) Andrew Vollmer, former SEC Acting General Counsel and Deputy General Counsel (January 21, 2009);

(6) Walter Ricciardi, former Deputy Director, Division of Enforcement (February 26, 2009);

(7) Antonia Chion, Associate Director, Division of Enforcement (January 7, 2009);

(8) Daniel Gallagher, former Counsel to the Chairman (March 6, 2009);

(9) Joan McKown, Chief Counsel, Division of Enforcement (May 4, 2009);

(10) Scott Friestad, Associate Director and former Deputy Director, Division of Enforcement (January 22, 2009);

(11) ENF Employee A [redacted]

(12) OIE Staff Office of Internet Enforcement, Division of Enforcement (January 21, 2009);

(13) ENF Employee B

(14) Unidentified Senior Enforcement Official[2] (November 3, 2008);

(15) ENF AD 4 Assistant Director, Division of Enforcement (November 3, 2008);

(16) ENF AD 3 Assistant Director, Division of Enforcement (November 3, 2008);

(17) ENF AD 5 Assistant Director, Division of Enforcement (November 3, 2008); and

(18) ENF AD 1 Assistant Director, Division of Enforcement (November 4, 2008).

The OIG also conducted telephone interviews of the following Enforcement staff assigned to various investigations involving Bear Stearns:

(1) ENF BC 7 Branch Chief (February 26, 2009);

(2) ENF BC 8 Branch Chief (February 26, 2009);

(3) ENF Staff Atty 1 Staff Attorney (February 26, 2009);

(4) ENF Staff Atty 5 Staff Attorney (October 24, 2008);

(5) ENF BC 3 Branch Chief (February 26, 2009);

(6) ENF BC 4 Branch Chief (February 26, 2009);

(7) ENF BC 6 Branch Chief (February 26, 2009);

[2] This individual requested confidentiality in the investigation and is referred to as "Unidentified Senior Enforcement Official" throughout the ROI.

(8) ENF Staff Atty 2 [redacted] Staff Attorney (February 26, 2009);

(9) ENF Staff Atty 4 [redacted] Staff Attorney (February 26, 2009);

(10) ENF Staff Atty 6 [redacted] Staff Attorney (February 26, 2009);

(11) ENF BC 9 [redacted] Branch Chief (February 26, 2009);

(12) ENF BC 1 [redacted] Branch Chief (February 26, 2009);

(13) ENF Staff Atty 3 [redacted] Staff Attorney (February 26, 2009);

(14) ENF BC 10 [redacted] Branch Chief (February 26, 2009);

(15) ENF BC 11 [redacted] Branch Chief (February 26, 2009); and

(16) ENF BC 2 [redacted] Branch Chief (February 26, 2009).

Finally, the OIG conducted telephone interviews of OPA Staff #1 [redacted] in the SEC's Office of Public Affairs on May 14, 2009, and OPA Staff #2 [redacted] in the Office of Public Affairs, on June 8, 2009.

Rules and Regulations Regarding Disclosure of Non-Public Information

I. SEC Rules Relating to Investigations – 17 C.F.R. Part 203

17 C.F.R. § 203.2: Information obtained in investigations and examinations.

> Information or documents obtained by the Commission in the course of any investigation or examination, unless made a matter of public record, shall be deemed non-public, but the Commission approves the practice whereby officials of the Divisions of Enforcement, Corporation Finance, Market Regulation and Investment Management and the Office of International Affairs at the level of Assistant Director or higher, and officials in Regional Offices at the level of Assistant Regional Director or District Administrator or higher, may engage in and may authorize members of the Commission's staff to engage in discussions with persons identified in § 240.24c-1(b)[3] of this chapter concerning information

[3] These persons identified in 17 C.F.R. § 240.24c-1(b) are: (1) a federal, state, local or foreign government body or instrumentality; (2) a self-regulatory organization (SRO); (3) a foreign financial regulatory authority; (4) the

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

17 C.F.R. §·203.5: Non-public formal investigative proceedings.

Unless otherwise ordered by the Commission, all formal investigative proceedings shall be non-public.

II. Commission Conduct Regulation -- 17 C.F.R. § 200.735-3

(b) A member or employee of the Commission shall not . . .

(7)(i) Divulge to any unauthorized person or release in advance of authorization for its release any nonpublic Commission document, or any information contained in any such document or any confidential information:

(A) in contravention of the rules and regulations of the Commission promulgated under 5 U.S.C. 552, 552a and 552b; or

(B) in circumstances where the Commission has determined to accord such information confidential treatment.

(ii) Except where the Commission or the General Counsel, pursuant to delegated authority, has previously granted approval or in relation to a Commission administrative proceeding or a judicial proceeding in which the Commission, or a present or former Commissioner, or present or former member of the staff, represented by Commission counsel, is a party, any officer, employee or former officer or employee who is served with a subpoena requiring the disclosure of confidential or non-public information or documents shall, unless the Commission or General Counsel, pursuant to delegated authority, authorizes the disclosure of such information or documents, respectfully decline to disclose the information or produce the documents called for, basing his or her refusal on this paragraph.

Securities Investor Protection Corporation; (5) a trustee in bankruptcy; (6) a trustee, receiver, master or special counsel; (7) a bar association, state accountancy board or other federal, state, local or foreign licensing or oversight authority; and (8) a duly authorized agent, employee or representative of any of the above persons.

III. Securities and Exchange Commission Rule 19-1 Regarding Disclosure of Non-Public Information in Connection with Investigations, Examinations, or Grants of Access

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

1. Policy.

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

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

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

2. Responsibility and Authorization.

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

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

3. Confidential Nature of Information.

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

IV. Policy and Best Practices Regarding External Communications in Enforcement Investigations

The Division of Enforcement issued a policy on external communications between senior Enforcement officials and persons outside the Commission in early 2008, after the OIG and Senate Finance and Judiciary Committees commenced investigations regarding concerns about Thomsen's communications with defense counsel during the SEC's

investigation of Pequot Capital Management.[4] In February 2008 that policy, along with recommended best practices, was posted on Enforcement's intranet web page. Exhibit 1. On October 6, 2008, Enforcement issued the Enforcement Manual, which included, among other things, the same policy and best practices on external communications between senior Enforcement officials and persons outside the Commission involved in investigations. Exhibit 2 at 37-40 (3.1.1).

That policy states, "The purpose of these best practices is to ensure that external communications between senior officials (at the Associate Director level and above) and persons outside the SEC are handled with the appropriate care, sensitivity and transparency." *Id.* The policy applies only to external communications that are (1) material, (2) relate to ongoing, active investigations, and (3) occur between senior officials and persons outside who are involved in investigations. *Id.* at 37.

The policy states that generally senior officials are encouraged to include other staff members on the investigative team when engaging in material external communications, and should try to avoid initiating communications without the knowledge or participation of at least one other staff member. *Id.* Participation refers to having the staff member be present during the communication or having the staff member involved in preparing the senior official for the communication. *Id.*

---

[4] The Pequot controversy involved both a joint Senate Finance and Judiciary Committee and an OIG investigation of allegations that, among other things, Enforcement supervisors gave improper preferential treatment to John Mack, the Chairman and Chief Executive Officer of Morgan Stanley, in the context of an Enforcement investigation. The staff attorney was told not to take Mack's testimony even though the attorney believed Mack was a potential tipper in an insider trading investigation against hedge fund Pequot Capital Management.

Both the Senate Finance and Judiciary Committee and the OIG investigations found that an Enforcement supervisor referenced Mack's political clout and referred to Mack's counsel, a former U.S. Attorney, as having "juice" in an e-mail, thus conveying the impression that political clout was a factor in the decision to not take Mack's testimony. The OIG investigation found that Mack's counsel did, in fact, reach out to Thomsen and that Thomsen shared information with Mack's counsel regarding the evidence Enforcement had against Mack in connection with the Pequot investigation without including the staff attorney on the investigation. *See* September 30, 2008 Report of Investigation: Case No. OIG-431, Reinvestigation of Claims by Gary Aguirre of Preferential Treatment and Improper Termination. The Senate Finance and Judiciary Committee August 2007 report concluded, among other things, that attorneys for Pequot and Morgan Stanley had direct access to Thomsen and an Associate Director of Enforcement. August 2007 Senate Committees on Finance and on the Judiciary, "The Firing of an SEC Attorney and the Investigation of Pequot Capital Management."

The OIG report concluded, "there are serious questions about the appropriateness of the current common practice in Enforcement that allows outside counsel the opportunity to communicate with those above the line attorney level on behalf of their clients when they have issues or disagreements with the Enforcement lawyers with whom they have been dealing."

When other staff members are not available, the policy states that the senior official must weigh several factors to determine whether to have the communication, including whether the senior official is familiar with the facts that are the subject of the communication, whether the investigative team is aware the outside person planned to initiate communication with the senior official, whether the outside person had previously discussed the matter with others on the investigative team, whether the senior official had been briefed about the communication, and whether the communication involved a matter of urgency, a routine issue, or a more complex situation in which the outside person is seeking agreement or representation. *Id.* at 37-38.

According to the policy, if a senior official does entertain such a communication without the participation or presence of other staff members, the senior official should: (1) indicate his or her entertaining the communication does not imply acquiescence or agreement, (2) indicate they are not in a position to reach an agreement or make a representation without the other investigative team members, (3) within a reasonable period of time document the material external communication, including orally reporting the details, to any of the assigned staff, and (4) at all times keep in mind the need to preserve the impartiality of the Division in conducting its fact-finding function and protect the propriety, fairness and objectivity of its investigations. *Id.* The policy specifically states, "The senior official should be particularly sensitive that an external communication may appear to be or has the potential to be an attempt to supersede the investigative team's judgment and expertise." *Id.* at 39.

The Results of the OIG Investigation

I. The Events During the March 15-16, 2008 Weekend Related to JPMorgan's Acquisition of Bear Stearns

On Sunday, March 16, 2008, JPMorgan agreed to acquire New York-based Bear Stearns.[5] *See* March 17, 2008, "JPMorgan gets Bear Stearns for a bargain basement $236M," USA Today, attached hereto as Exhibit 3. A loss of investor confidence had caused a run on Bear Stearns and ended 85 years of independence for Wall Street's fifth-largest securities firm. *Id.* Federal regulators, including the Department of the Treasury and the Federal Reserve, helped orchestrate the sale over the weekend of March 15-16, 2008, to prevent the feared market decline that may have resulted if the markets opened the following Monday, March 17, prior to Bear Stearns being acquired. *Id.*

[5] Bear Stearns was a global investment banking, securities trading, and brokerage firm. Bear Stearns & Co. Inc., a subsidiary of The Bear Stearns Companies, Inc., offered private client services and asset management, institutional equity and fixed income sales, trading, research, and investment banking. *See* http://www.bearstearns.com.

The SEC staff communicated daily with staff of the Federal Reserve Bank of New York during the week of March 10, 2008, regarding Bear Stearns' financial condition. *See* Chairman's Responses to Questions Posed in April 2, 2008 Letter from Senator Charles Grassley, dated April 16, 2008 ("Chairman's Response"), attached hereto as Exhibit 4. Additionally, SEC officials participated in calls with the Treasury, Federal Reserve, and the Federal Reserve Bank of New York beginning Thursday, March 13 and through the weekend, regarding Bear Stearns' condition. *Id.*

As noted in the Chairman's Response:

> What happened to Bear Stearns during the week of March 10th was unprecedented. For the first time, a major investment bank that was well-capitalized and apparently fully liquid experienced a crisis of confidence that denied it not only unsecured financing, but short-term secured financing.... Over the weekend, Bear Stearns faced a choice between filing for bankruptcy on Monday morning, or concluding an acquisition agreement with a larger partner.

Id. at 5.

A. The SEC Staff's Internal and External Communications Regarding JP Morgan's Request for Assurances Related to SEC Investigations of Bear Stearns

During the week of March 10, 2008, the SEC's Division of Trading and Markets ("Trading and Markets") had been tracking Bear Stearns' precarious liquidity positions closely. Transcript of Testimony of Erik Sirri, the Director of Trading and Markets at that time, ("Sirri Tr."), April 21, 2009, attached hereto as Exhibit 5, at 12; OIG Audit Report No. 446-B, *SEC's Oversight of Bear Stearns and Related Entities: Broker-Dealer Risk Assessment Program*, Sirri testified that Trading and Markets knew that Bear Stearns was in trouble for weeks but that it became more focused on the issue during the week of March 10, 2008. Sirri Tr. at 12.

Then SEC Deputy General Counsel Andrew Vollmer testified that he learned JPMorgan was in talks to acquire Bear Stearns on Saturday, March 15, 2008, when Robert Hoyt, the General Counsel of the Treasury, contacted him at home. Transcript of Testimony of Andrew Vollmer ("Vollmer Tr."), January 21, 2009, attached hereto as Exhibit 6, at 10. According to Vollmer, Hoyt raised two issues during that call: (1) whether Federal regulators, including the SEC, would hold JPMorgan liable for any violations committed by Bear Stearns prior to the

acquisition and (2) the gravity of the situation suggested there might be a need for emergency powers to be invoked. *Id.* at 11. Vollmer testified that the emergency powers were not invoked by the SEC that weekend. *Id.* at 13.

At 4:52 p.m. on Saturday March 15, 2008, Cutler sent Thomsen an e-mail asking if he could call Thomsen and stating, "It's urgent." Exhibit 7. Cutler and Thomsen had a close relationship; when Cutler was the Director of Enforcement, he had promoted Thomsen to the position of Deputy Director of Enforcement. Transcript of Testimony of Linda Chatman Thomsen ("Thomsen Tr."), May 11, 2009, attached hereto as Exhibit 8, at 8.

Shortly after she received that e-mail, Thomsen testified that Cutler called her on her cell phone while she was on her way to meet her husband for dinner. Thomsen Tr. at 11-12. Thomsen testified that she could not recall the specific details of her conversation with Cutler, but she remembered that: (1) Cutler told her he would not have called if it was not important; (2) that what he was about to tell her was highly confidential; (3) JPMorgan was considering acquiring Bear Stearns, in part at the urging of the Federal government; and (4) time was of the essence because all the parties involved hoped that the transaction could go forward midday Sunday before the Asian markets opened. *Id.* at 12.

Thomsen also testified that she understood from her Saturday evening phone conversation with Cutler that, due to the transaction's accelerated time table, JPMorgan was trying to accomplish in a matter of a day or two, work that typically took months. *Id.* Cutler alerted Thomsen that there were a number of issues JPMorgan was trying to resolve with several government entities. *Id.* at 12-13. Thomsen testified that she understood from Cutler that JPMorgan had already done some due diligence and knew that the SEC had ongoing investigations involving Bear Stearns. *Id.* at 13.

According to Thomsen, Cutler was not seeking to influence or discuss any particular Bear Stearns investigation. *Id.* Thomsen testified that she did not think she talked about any investigations with Cutler, although she was aware of at least one Enforcement investigation involving Bear Stearns, nor did she take any actions during the weekend to find out about ongoing investigations.[6] *Id.* at 29-30.

---

[6] Vollmer also testified that there was no request from JPMorgan for information about an open investigation or potential future investigations. *Id.* at 45. Vollmer added, "And there was no discussion of any such investigation internally among the SEC people with whom I spoke that weekend." *Id.* Similarly, Brian Cartwright, the SEC's General Counsel, testified he did not remember talking about any specific Bear Stearns investigations during the weekend. Transcript of Testimony of Brian Cartwright ("Cartwright Tr."), January 27, 2009, attached hereto as Exhibit 9, at 38.

Thomsen testified that Cutler was seeking comfort that the SEC would not seek monetary penalties against JPMorgan for any violations of the federal securities laws by Bear Stearns that had occurred prior to the contemplated acquisition. *Id.* Thomsen testified that during her Saturday evening conversation with Cutler, she told him it was going to be difficult to respond to his request by midday Sunday. *Id.* at 14. Thomsen testified she recalled saying something to the effect of it was not her decision to make and that the Commission would have to decide whether to give JPMorgan any comfort on the issue. *Id.* Thomsen also testified that she told Cutler that Enforcement's general policies regarding seeking penalties against entities should provide JPMorgan with some comfort. *Id.*

Thomsen testified that after Cutler's phone call, she reached out to Cartwright, Chairman Christopher Cox (or his Chief of Staff, Peter Uhlmann), and Sirri, and informed them of her conversation with Cutler. *Id.* at 15. Thomsen's testimony on this point is corroborated by a 6:03 p.m., March 15, 2008, e-mail from Thomsen to the Chairman, Sirri, and Uhlmann, stating, "I just got a call from Steve Cutler — they are looking for some pretty significant regulatory/enforcement comfort very quickly (mid morning tomorrow)." Exhibit 10.

Cutler testified that in the March 15, 2008 call with Thomsen, he advised her of the possibility of a transaction and explained the background and timetable it was on. Transcript of Testimony of Steve Cutler ("Cutler Tr."), March 11, 2009, attached hereto as Exhibit 11, at 16. Cutler testified that his communications with Thomsen were of a general nature and that he did not ever discuss with Thomsen any active Bear Stearns investigations. *Id.* at 12-13, 16 & 19. Cutler further testified that no one at JPMorgan asked him to find out about particular Enforcement investigations. *Id.* at 20. Cutler recalled, "I didn't have any particular understanding of any particular matter or investigation." *Id.* at 21. According to Cutler, Thomsen did not confirm the existence of, or mention the specifics of, any investigation. *Id.* at 23.

Cutler testified that his purpose for calling Thomsen was to get comfort that any SEC investigations of Bear Stearns' conduct up to that point would not result in liability for JPMorgan. *Id.* at 20. Cutler added, "It was not a request that the SEC simply drop investigations of matters that related to Bear Stearns." *Id.* at 21. Cutler said he did not remember getting a particularly positive response from Thomsen, who told him she would "have to take that up with others" at the Commission, and thought the gist of what she was telling him was that the SEC would take it under advisement. *Id.* at 13 & 19. Cutler said he had the impression Thomsen was going to be communicating with the SEC Chairman. *Id.*

At 7:39 p.m. on Saturday, March 15, 2008, Cutler followed up his conversation with Thomsen with an e-mail to her stating, "We think we may need emergency powers relief." Exhibit 12. Sirri testified that he had a telephone conversation with Cutler on the evening of

Saturday, March 15, 2008. Sirri Tr. at 16-18. During that conversation, Cutler expressed concern about a variety of issues, including the Enforcement issue. *Id.*

At 8:41 p.m. on Saturday, March 15, 2008, Sirri e-mailed Thomsen and others and stated that he was engaged in discussions with the Federal Reserve and Treasury and that they were trying to "broker" the purchase of Bear Stearns by JPMorgan. Exhibit 13. Sirri's e-mail included the following:

> JPMorgan had several [requests] of regulators. One of them involved us. They asked that if they acquire Bear Stearns, JPMorgan be absolved of all past misdeeds of Bear Stearns and that they have no liability for Bear Stearns's past actions. I spoke to [Vollmer] and [Thomsen] about this, and each expressed certain concerns about providing such relief.

Id.

Sirri also stated that he had spoken with Chairman Cox, and that Cox had asked that the SEC's General Counsel, Brian Cartwright, and Deputy General Counsel, Andrew Vollmer, "get involved." *Id.* According to Sirri's e-mail, the Chairman "was specifically concerned with the form that the relief might take, and whether that relief would require the formal assent of the SEC's Commissioners." *Id.*

On Sunday, March 16, 2008, at 8:11 a.m., Thomsen sent Cutler an e-mail asking him to call her in her office. Exhibit 12. Cutler responded that he would call her in a few minutes. *Id.* According to Thomsen, she did not remember that conversation with Cutler, but noted she spoke with a lot of people that day. Thomsen Tr. at 24. Cutler testified that he believed he spoke with Thomsen between two to four times during the weekend of March 15-16, 2008. Cutler Tr. at 9.

At 11:40 a.m. on Sunday, March 16, 2008, Sirri e-mailed Thomsen, Vollmer and Cartwright listing Cutler's requests to the SEC, including:

> 5) Assurance that the SEC won't take [Enforcement] action against Bear [Stearns] or [JPMorgan] (as successor) entities in connection with pre-close conduct that occurred at Bear [Stearns].

Exhibit 14.

Thomsen testified that she did not believe that Cutler's requests were "outrageous,"

> Because, as I think I mentioned to him in the first call, if the facts were some conduct occurred at Bear Stearns before JPMorgan Chase had anything to do with Bear Stearns, JPMorgan Chase acquires Bear Stearns in part at the urging of the government; we at the SEC or the Enforcement Division determines there has been a violation of the securities laws that Bear Stearns engaged in before JPMorgan had anything to do with it and without involvement of JPMorgan Chase or anyone at JPMorgan Chase; based on my experience at the Division of Enforcement, I thought it unlikely that the division would recommend enforcement action against JPMorgan Chase for that behavior. And I thought it unlikely that the Commission would pursue an enforcement action against JPMorgan Chase for that conduct.

Exhibit 8.

Cutler's request for assurances from Enforcement prompted several internal discussions between Thomsen and the SEC's Office of the General Counsel ("OGC"). According to Vollmer, Thomsen wanted OGC's views on what the SEC's response to JPMorgan's request should be. Vollmer Tr. at 38. Vollmer testified that from the beginning "we all rejected the idea of providing the assurances that JPMorgan requested." *Id.* at 45. He added, "[Thomsen] said early on, well, we can't do that." *Id.* at 46. Vollmer reiterated that Thomsen and OGC agreed it would not be prudent or advisable to provide what JPMorgan requested. Vollmer Tr. at 72. Vollmer further testified,

> But we recognized that there was a transaction being discussed that was very important to the national economy, so there were urgent circumstances, and that we should contemplate providing something that would assist the transaction but without going beyond bounds that we thought appropriate, which would mean lawful as well as prudential.

Id.

Cartwright, on the other hand, testified that Thomsen initially said she was comfortable giving Cutler the relief he requested. Cartwright Tr. at 21-22; 33. Cartwright also testified that

Thomsen said that if they were not going to provide JPMorgan with the relief they requested they should let JPMorgan know as soon as possible. *Id.* at 27.

Cartwright testified that he had not been Deliberative Process [redacted] *Id.* at 22. Cartwright explained, "Well, I think almost anybody at the SEC would find it very difficult to swallow the notion that we would give a pass for past violations of the securities laws. That's just something we don't normally do." *Id.* However, Cartwright acknowledged that this was an "exceedingly unusual and extraordinary event," with the Federal government as a whole pushing for relief to prevent Bear Stearns from becoming insolvent. *Id.* Cartwright's understanding of the outcome of Thomsen's discussions with OGC regarding what the staff referred to as the Enforcement issue was memorialized in his contemporaneous response to Sirri's March 16, 2008, 11:40 a.m. e-mail, Deliberative Process [redacted]

Cartwright testified that the issue of greatest concern to him "was the request by JPMorgan to provide relief in some form with respect to potential future enforcement actions related to conduct by Bear Stearns prior to the acquisition." Cartwright Tr. at 20. Cartwright recalled that Thomsen conveyed to him that Cutler was concerned that the Commission provide relief that could not be revoked by a later Commission. *Id.* at 21. He added that he was under the impression that what Cutler initially requested would have required Commission action if somehow the current Commission were to provide relief that would bind future commissions. *Id.* at 32-33. Cartwright further testified that since Cutler had been a former Director of Enforcement he believed Cutler would understand this relief would be "exceedingly difficult" for the Commission to provide. *Id.* at 24.

The SEC staff Thomsen consulted with about Cutler's request were aware of the relationship between Thomsen and Cutler. Sirri's notes from discussions he had that weekend with OGC and Thomsen include the following reference:

Linda ←→ Steve relationship

Exhibit 15.

Sirri testified that the reference to the "Linda/Steve relationship" was a note he made to himself. Sirri Tr. at 20. Sirri testified, ". . . it struck me, even not being an attorney, that we have to be careful because [Cutler] had previously been here." Sirri Tr. at 20. He added, "We need to be careful as an agency not showing favoritism to one registrant over another." *Id.* According to Sirri, he did not recall any discussion about recusing Thomsen and that he believed he would have remembered that discussion. Sirri Tr. at 24.

Cartwright testified that he brought up this issue of the relationship between Cutler and Thomsen on Sunday morning during an SEC conference call because he thought if the SEC provided relief to JPMorgan, critics might focus on that relationship. Cartwright Tr. at 43. Cartwright said he did not advise Thomsen not to talk directly with Cutler, however, because he did not want to interfere with the process. *Id.* at 43-44. He explained that they all had an interest that Thomsen not appear in an unfavorable light. *Id.* at 44. Vollmer did not recall any discussion about the Cutler/Thomsen relationship. Vollmer Tr. at 63. He added that the relationship was not a concern to him and did not arise in his mind as an issue. *Id.* at 64.

At 12:59 p.m. on Sunday, March 16, 2008, Hoyt sent an e-mail to Cutler, Vollmer and senior officials at the Treasury Department, U.S. Department of Justice Antitrust Division, and the Federal Reserve Bank of New York asking for an immediate (1:00 p.m.) conference call with JPMorgan's legal teams and the regulators to discuss the various pending legal and regulatory issues. Exhibit 16. Vollmer immediately (1:03 p.m.) forwarded Hoyt's e-mail to Sirri, Cartwright and Thomsen and stated, "I think Erik [Sirri] and Linda [Thomsen] should join the call but propose that Brian [Cartwright] and I stay out so Linda and Erik have some flexibility to say she needs to discuss." *Id.* Vollmer testified that he made his suggestion "as a tactical matter, the goal was to be helpful but in a most minimal way, that is, to do the least amount to be helpful for the transaction." Vollmer Tr. at 79. Vollmer believed "it was better . . . that no senior person from OGC be on the call" so that Thomsen and Sirri could "say, in response to any particular issue, that they want to think about it and they would like to consult with others in the agency." *Id.* In fact, Thomsen and Sirri participated in that conference call; Cartwright and Vollmer did not participate. Thomsen Tr. at 26; Vollmer Tr. at 79 & 90; Cartwright Tr. at 58-59

Thomsen testified that, during that 1:00 p.m. call, the Enforcement issue was discussed, but did not remember what she said or even whether Cutler was on that call. Thomsen Tr. at 27-28. During the call, Thomsen sent an e-mail to Cartwright, Sirri, and Vollmer stating, "I'm on the call proceeding along the lines we discussed (if we get to the enf issue) unless someone tells me otherwise." Exhibit 17. Cutler testified that the only thing he recalled about the discussion of the Enforcement issue during the 1:00 p.m. call was that Thomsen was "not terribly encouraging." Cutler Tr. at 38.

At 2:10 p.m., Cutler sent Sirri an e-mail with the subject line, "Just to confirm" that stated, "I'm looking for a letter/email confirming that . . . staff would not recommend any enforcement action as a result of our control of Bear Stearns prior to the close of the purchase." Exhibit 18.

At 2:30 p.m. on Sunday, March 16, 2008, Cartwright e-mailed the Principal Associate General Counsel and Deputy General Counsel in OGC, Meredith Mitchell and Alex Cohen, "[Thomsen] is preparing a draft assurances letter which will be self-explanatory. . . . The draft

would go to [JPMorgan] at about 4. Talk is announcement of the transaction at 5 . . . ." Exhibit 19.

At 2:36 p.m. Thomsen e-mailed Cartwright, Vollmer and Sirri a draft of a letter to JPMorgan (the "Thomsen draft").[7] Exhibit 20. The Thomsen draft included:

Deliberative Process

Id.

The assurance in the Thomsen draft related to the "60 day pre-announcement period" was narrower than Cutler's original request. Vollmer Tr. at 25. Vollmer testified that,

Deliberative Process

Id.

The Thomsen draft also included a bracketed paragraph which began:

Deliberative Process

Exhibit 20.

[7] The 2:36 p.m. draft of the letter is the earliest draft that the OIG discovered. However, Thomsen's e-mail that circulated the draft referred to it as "a second one draft wonder," suggesting that there may have been an earlier draft. Exhibit 20. In addition, Vollmer testified that he thought a draft letter had been prepared before the 1:00 p.m. call. Vollmer Tr. at 79.

(b)(5)

Cartwright testified that as soon as they had the Thomsen draft in hand, the General Counsel's office caucused and that "Alex Cohen started making a revised draft while we were speaking." Cartwright Tr. at 63. Cartwright testified, "one of the points that was apparent in [the Thomsen] draft is that it took an approach that I thought was –

Deliberative Process

Alex Cohen, who at the time of this transaction was a Deputy General Counsel, edited the Thomsen draft and circulated a new draft (the "Cohen draft") to Cartwright, Vollmer and others at 3:32 pm on Sunday. Exhibit 21. The Cohen draft differed from the Thomsen draft in the following respects. First, the Cohen draft was revised from being addressed directly to Cutler to Chairman and CEO James Dimon. *Id.* In addition, the Cohen draft deleted the sentence stating,

Deliberative Process

According to Vollmer, they added the word "any" in the Cohen draft in an effort to adhere to the policy of not disclosing the existence or non-existence of investigations. Vollmer Tr. at 101. Vollmer admitted it was a hurried effort and they "maybe" missed the second reference to "matters currently under investigation." *Id.* at 105. Vollmer also testified that either the General Counsel's office or Thomsen herself decided to leave out most of the second paragraph in Thomsen's initial draft which stated. Deliberative Process

Exhibit 20. According to Vollmer, they decided to take that sentence out:

Deliberative Process

Deliberative Process

[redacted]

Vollmer Tr. at 100-101.

At 4:44 p.m., Thomsen e-mailed Cutler a letter addressed to James Dimon, Chairman and CEO of JPMorgan, (the "Dimon letter"). Exhibit 22. The letter stated:

> We have been advised by officials of the Board of Governors of the Federal Reserve System and the U.S. Department of the Treasury that JPMorgan Chase & Co. ("JPM") is contemplating an acquisition of The Bear Stearns Companies Inc. ("BSC"), with a public announcement of that intention as early as later today. In connection with its evaluation of the desirability of such an acquisition, you have informed us that JPM has concerns about its potential exposure to enforcement action by the U.S. Securities and Exchange Commission (the "Commission"), should it acquire BSC, arising out of statements made by BSC in the 60 days prior to the public announcement of the proposed acquisition by JPM.
>
> * * *
>
> With regard to JPM, however, our recommendations to the Commission will be informed by, among other things, the principles outlined in the Commission's October 23, 2001 Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions (the Seaboard Report) and in the January 4, 2006 Statement of the Securities and Exchange Commission Concerning Penalties.
>
> * * *
>
> Based on our current understanding, many of these factors weigh against a recommendation from the Division of Enforcement for an enforcement action against JPM, directly or indirectly, arising out of statements made by

> BSC in the 60 days prior to the public announcement of the proposed acquisition by JPM.
>
> * * *
>
> In connection with this letter, I have consulted senior staff officials in other relevant Divisions of the Commission.

Id.

With respect to potential investigations of individuals associated with Bear Stearns during those 60 days, the Dimon letter stated, "This letter does not address any potential enforcement actions against any other persons (including any individuals employed by BSC)." *Id.*

With respect to ongoing investigations, the Dimon letter stated:

> [N]othing in this letter should be construed as reaching any conclusion as to the underlying merits of any of the matters currently under investigation or those that may be investigated in the future.

Id.

Cutler testified he was not very happy with what the letter said because he felt that JPMorgan "didn't get an assurance of any sort." Cutler Tr. at 32-33. Cutler also testified that when he received the Dimon letter, he was not "entirely happy that there was a particular reference to an investigation or the possibility of an enforcement action related to something particular when I knew that my request was much broader, it was with respect to any sort of enforcement action." *Id.* at 33. He explained, "I remembered thinking okay, this is better than a poke in the eye with a sharp stick. But, you know, I didn't get what I would have liked to have gotten." *Id.* According to Cutler, the only assurance JPMorgan got at all from Thomsen was what was contained in the letter from her to Dimon. *Id.* at 25. He further testified, "I had no impression that I had gotten a promise or anything different from what was in the letter." *Id.* at 43.

B. The SEC Staff's Actions Regarding JPMorgan's Request for Relief Related to Other Issues

The Enforcement issue was not the only issue for which JPMorgan sought relief and/or clarification from the SEC during the March 15-16, 2008 weekend. On Sunday, March 16, 2008, Sirri e-mailed Thomsen, Vollmer and Cartwright a list of Cutler's requests to the SEC as follows:

1) Emergency powers to assume control of Bear Stearns [broker dealers] as of tomorrow.
2) Emergency powers to assume control of Bear Stearns [investment advisors] (which advise, among other things, registered investment companies) tomorrow.
3) Affiliated/principal transaction exemptions to the extent that we're effecting transactions starting tomorrow for Bear Stearns managed accounts.
4) Expedited approval of changes of control.

Exhibit 14.[8]

In response to those requests, at the same time that the SEC staff sent the Dimon letter, it sent JPMorgan several other letters clarifying the staff's position on certain matters connected with the merger. *See* Exhibit 23. Trading and Markets wrote a no-action relief letter addressing the timing of JPMorgan's filing of a Form BD with the SEC. Exhibit 24. The letter stated that Trading and Markets would not recommend an enforcement action due to the timing of JPMorgan's filing of a Form BD with the Commission. *Id.* The Trading and Markets letter stated that it would be acceptable if JPMorgan filed a completed Form BD within a reasonable time after the Bear Stearns/JPMorgan merger closed, which was expected to occur 60 days after the transaction. *Id.*

The Division of Investment Management ("Investment Management") wrote two letters concerning issues arising out of the change in control of the investment advisers for the Bear Stearns' mutual funds, and certain principal trading restrictions that arose from JPMorgan's assumption of control over Bear Stearns's advisory duties. Exhibit 25. Normally a change in control of the adviser would cause the advisory contracts to terminate, and an in-person board

[8] According to Sirri and Cartwright, these other requests for relief did not create any significant issues. Sirri Tr. at 41; Cartwright Tr. at 23. Cutler's requests for relief were more problematic for Enforcement. Cartwright Tr. at 26. Sirri agreed that the "sticking point" in the JPMorgan/Bear Stearns transaction was the Enforcement issue. Sirri Tr. at 41. He explained that Enforcement had a very different issue because JPMorgan did not want to have any liability from Enforcement while the other relief sought only involved extended deadlines. *Id.* Sirri testified that Chairman Cox also considered the request for relief from Enforcement as the more difficult issue. Sirri Tr. at 60.

meeting is required to approve contracts resulting from the change in control. *Id.* Investment Management's letter stated that provided the new contracts were substantially the same as the old ones, and certain other conditions were met, it would not recommend an enforcement action to the Commission. *Id.* Investment Management also allowed relief from certain principal trading restrictions. *Id.* The Division of Corporation Finance wrote a letter addressing sales by client accounts managed by JPMorgan and Bear Stearns, in view of the control relationship created by the merger agreement. Exhibit 26.

C. The Involvement of the Chairman and the Commissioners

As discussed above, the OIG investigation revealed that Thomsen e-mailed the SEC Chairman on Saturday night March 15, 2008, regarding this matter. Exhibit 10. After that initial e-mail, Thomsen did not contact the Chairman or the Chairman's office again that weekend. Thomsen Tr. at 16. Sirri and Cartwright, however, did speak with the Chairman during that weekend. Sirri Tr. at 23; Cartwright Tr. at 20, 39 & 60. We found no evidence that anyone contacted any of the Commissioners until after the Dimon letter was issued on Sunday afternoon. Sirri Tr. at 59-60; Cartwright Tr. at 20 & 60-61; Vollmer Tr. at 42 & 119.

Sirri testified that he believed it was his job to keep the Chairman informed, and that it was up to the Chairman to decide whether to include the Commissioners. Sirri Tr. at 59-60. Sirri told us that he recalled that he spoke to the Chairman once that weekend. Sirri Tr. at 46-47 & 68. Sirri recalled that the number one thing to do after speaking to the Chairman was to get the General Counsel involved because the Chairman was concerned about the Enforcement issue. Sirri Tr. at 60.

After Cartwright became involved in the discussions, he also communicated with the Chairman by telephone that weekend. On Sunday at 1:27 p.m., Cartwright e-mailed Mitchell and Cohen, "Just off long call with [Chairman Cox] and then with [Sirri] as well." Exhibit 27. At 2:30 p.m. on Sunday, Cartwright e-mailed Mitchell and Cohen, "[Thomsen] is preparing a draft assurances letter which will be self-explanatory . . . . The draft would go to [JPMorgan] at about 4. Talk is announcement of the transaction at 5. After working things out with [Thomsen], we'll need time in the schedule to clear with [Chairman Cox]." Exhibit 19. Cartwright testified that he did talk with Chairman Cox later on Sunday afternoon just before they were going to send the package of letters to JPMorgan, including Thomsen's letter to Dimon, and that the Chairman signed off on proceeding. Cartwright Tr. at 60. Cartwright testified that he viewed this as the Chairman's "last clear chance" to object to the staff's actions. *Id.*

On Sunday, at 6:33 p.m., Sirri e-mailed the Director of Investment Management, Andrew Donohue, and Thomsen, copying other SEC officials, "We should probably inform the

Commission about the activities over the past 24 hours, especially the [no action] relief provided." Exhibit 28. Sirri asked that Thomsen and Donohue provide him with language to include in an e-mail to the Commission about the relief Enforcement and Investment Management provided to JPMorgan. *Id.*

At 11:51 p.m. on Sunday, March 16, 2008, Sirri e-mailed Chairman Christopher Cox and the other two sitting Commissioners – Commissioners Kathleen Casey and Paul Atkins – the following explanation of what had transpired over the weekend:

> Over the last 48 hours, SEC staff has been working with the staff of the Treasury and the Fed, as well as with JPMorgan, to contribute to the effort to contain the damage caused by the near-failure of Bear Stearns and its subsequent merger into JPMorgan. This email provides context for staff activities and describes the no-action relief provided by the respective Divisions needed to facilitate the merger Sunday evening. We are happy to meet with you to discuss these matters in more detail.
>
> Context
>
> We have been coordinating closely with the Federal Reserve and Treasury Department to respond to this week's collapse in confidence in Bear Stearns . . . .
>
> On Friday, the Federal Reserve Bank of New York arranged with Bear Stearns's clearing bank, JP Morgan Chase, for JPMorgan to lend Bear [Stearns] funds against a broad range of collateral, which JPMorgan could then fund with the NY Fed. This arrangement staved off bankruptcy on Friday, but customer funds and secured funding continued to flow out of Bear [Stearns] at a rapid rate. By Saturday, JPMorgan had loaned Bear [Stearns] over $8B with no end in sight. Bear [Stearns'] international clearing bank notified Bear [Stearns] that it would no longer clear for Bear Stearns, but later reversed this decision . . . .
>
> These problems had to be addressed before trading began again in foreign markets Sunday night. We had our CSE monitors in place in the CSEs, and invited the NY Fed staff

> to join them. In turn, we were invited to join the NY Fed staff at their offices to analyze the information. We were in constant contact throughout Saturday and today with the Treasury, the Federal Reserve Board, and the NY Federal Reserve Bank. It became clear that absent a buyer for Bear Stearns, it must declare bankruptcy on Monday. As the hours passed, JP Morgan emerged as the sole purchaser, but it was reluctant to purchase Bear [Stearns] for a variety of reasons, including its potential liabilities for Bear Stearns statements, and potential delays in transferring control. JPMorgan asked us to address these issues.
>
> * * *
>
> Enforcement letter
>
> Enforcement wrote a letter in response to a concern that JPM expressed about its potential exposure to enforcement action arising out of statements made by Bear Stearns in the 60 days prior to the public announcement of the JPM merger. The Division stated that it could not come to final decisions regarding actions regarding Bear as the investigations were still in process. It offered comfort to JPM that it understood the circumstances of the JPM acquisition and that it would consider those circumstances in deciding whether it would recommend action against JPM for past misdeeds of Bear. It also stated that it was unlikely to recommend action against JPM arising out of statements made by Bear in the 60 days prior to the public announcement of the proposed acquisition by JPM.

Exhibit 23.

The OIG investigation revealed that the SEC staff did not believe their actions that weekend, including sending the Dimon letter, required formal Commission approval. As discussed above, Sirri testified that he kept the Chairman informed, and that it was up to the Chairman to decide whether to include the Commissioners. Sirri Tr. at 59-60. However, the record shows that Sirri had relayed to Cartwright, Vollmer, and Thomsen after a conversation with Chairman Cox on Saturday, March 15, 2008, that Cox "was specifically concerned with the form that the relief might take, and *whether that relief would require the formal assent of the SEC's Commissioners.*" Exhibit 13 (emphasis added).

Cartwright did not recall that Cox had asked whether the other Commissioners should be "informed of the situation." Cartwright Tr. at 32. Cartwright testified that he believed Commission approval was not needed before the Dimon letter was sent, as follows:

> Well, what we were proposing to do certainly did not require Commission action, and, in fact, was inconsistent -- maybe a little bit of an overstatement, but it was the kind of action that is done without Commission involvement.
>
> What Mr. Cutler initially requested certainly would have required Commission action; that is, if somehow the current Commission were to bind future commissions with respect to relief, that would have required Commission action.

Id. at 32-33.

The OIG did not find any SEC rule or policy that required that the participants in the events of the weekend of March 15-16, 2008 obtain formal Commission approval before making any critical determinations about the viability of future Enforcement investigations. However, we recommend that the circumstances in which Commission approval is required should be clarified so that SEC senior staff are aware of their authority when making decisions that may bind future Commissions.

D. Other Enforcement Staff Attempted to Become Involved in the Decision-Making Process During the March 15-16, 2008 Weekend

Thomsen testified that she did not inform anyone, nor did she contemplate informing anyone, in Enforcement about the proposed transaction until after the JPMorgan/Bear Stearns transaction had already taken place. Thomsen Tr. at 34, 35. Thomsen testified she did not recall speaking to anyone from Enforcement that weekend, including Ricciardi or Chion, who as discussed below, reached out to Thomsen on Sunday evening. Thomsen Tr. at 35.

Antonia Chion, an Associate Director in Enforcement, testified that she first learned of the JPMorgan/Bear Stearns transaction on Sunday evening, March 16, 2008. Transcript of Testimony of Antonia Chion ("Chion Tr."), January 7, 2009, attached hereto as Exhibit 29, at 8. Chion testified that her Assistant Director [ENF AD 1] called her on Sunday and told her about the possible JPMorgan/Bear Stearns transaction. *Id.* According to Chion, [ENF AD 1] had received a telephone call from the United States Attorney's Office ("USAO") handling the parallel criminal investigation advising him that Bear Stearns was either going to file for bankruptcy or would be bought, and that JPMorgan had reached out to the USAO to determine what was

happening in the parallel criminal investigation. *Id.* Chion testified that when ENF AD 1 called her, she had no idea what was going on or if anyone from Enforcement knew about a possible JPMorgan/Bear Stearns transaction. *Id.*

Chion's group had a significant open investigation into two of Bear Stearns Asset Management portfolio managers for misleading investors about the financial state of the firm's two largest hedge funds. Chion Tr. at 27; *see also* Transcript of Testimony of Unidentified Senior Enforcement Official ("Unidentified Senior Enforcement Official Tr."), November 3, 2008, attached hereto as Exhibit 30, at 7-8; Transcript of Testimony of ENF AD 1 Tr."), November 4, 2008, attached hereto as Exhibit 31, at 9-12. The USAO for the Eastern District of New York was conducting a parallel criminal investigation. Chion Tr. at 9. According to Ricciardi, this was the most active subprime investigation in Enforcement at that time and that he heard from Chion that it might be the best case Enforcement had at the time. Ricciardi Tr. at 76.

Chion testified that after her call with ENF AD 1 she called Thomsen and asked, "Did you know that J.P. Morgan may be acquiring Bear Stearns? And is anyone representing Enforcement's interests?" *Id.* at 10. Thomsen told her she knew about the pending transaction and that she had written a letter to JPMorgan. *Id.* at 10-11. Chion testified that sometime later that night, Thomsen called her back and read Chion the Dimon letter over the phone. *Id.* at 11. Chion testified that she had called Thomsen because she was concerned about making sure that Enforcement's interests were being represented and noting, "... in my mind, I didn't know if the Commission was meeting, because the Commission does have the authority [to not bring an enforcement action]." *Id.* at 36. Chion testified that while Thomsen was reading the letter to her, she was thinking, "Does that do what we need it to do? Does that keep all of our options open?" *Id.* at 35-36. But Chion testified that her second call with Thomsen was not much of a give-and-take conversation. *Id.* at 35.

While Chion did not testify that she was unhappy with the events of that weekend, Walter Ricciardi, the Deputy Director of Enforcement at the time, and Scott Friestad, an Associate Director in Enforcement, testified that they believed Chion was unhappy that she had not been consulted. Transcript of Testimony of Walter Ricciardi ("Ricciardi Tr."), February 26, 2008, attached hereto as Exhibit 32, at 101; Transcript of Testimony of Scott Friestad ("Friestad Tr."), January 22, 2009, attached hereto as Exhibit 33, at 114-116. Ricciardi testified that when he spoke to Chion on Monday, he learned that Chion had reached out to Thomsen on Sunday and Thomsen "blew her off." Ricciardi Tr. at 101. Ricciardi testified he would have consulted with Chion that weekend because of her group's Bear Stearns investigation. *Id.* at 81-82.

Friestad testified, "I had the sense that [Chion] was not happy with the process." Friestad Tr. at 114. Friestad further testified that he and Chion discussed her concern that she may have difficulty moving her case forward. *Id.* at 115-116. Friestad testified that he believes he had discussions with Chion about this "probably closer in time to the meeting we had in June or July when Bear Stearns and JPMorgan were coming in for the meeting [about Chion's case]." *Id.* at 116.

Ricciardi testified that on Sunday, March 16, 2008, while he was sitting with his family watching television in his apartment in New York, he received a call on his cell phone from a reporter indicating that JPMorgan had made a bid for Bear Stearns. Ricciardi Tr. at 74. At 9:16 p.m. on Sunday, Ricciardi e-mailed Thomsen and others at the SEC describing the JPMorgan/Bear Stearns transaction:

> JPMorgan Chase bought Bear Stearns today for about $2 a share. It was trading for $30 a share at the close Friday and traded for $170 per share a year ago. It is a complete wipe out. Its [sic] building in Manhattan is worth more than the purchase price, $236 million. It went public in 1985 for $6 a share.

Exhibit 34.

Thomsen immediately responded to Ricciardi stating, "I've been working on it all day today--will fill you in tomorrow." *Id.* Ricciardi replied, asking Thomsen, "Did we promise that JPMC would not pick up its regulatory liabilities?" *Id.* Ricciardi testified he posed his question for two reasons. Ricciardi Tr. at 78. First, Enforcement's investigations are confidential and staff are not allowed to talk to third parties about them, even in the context of one company's due diligence related to a possible acquisition. *Id.* Second, Ricciardi testified that he knew staff had concerns about senior level contacts. *Id.* Thomsen responded to Ricciardi's question, "No. But as I said we can discuss this tomorrow." Exhibit 34. Ricciardi understood Thomsen's response as a signal that she did not want him involved in the situation. Ricciardi Tr. at 75. Ricciardi testified that he had no further communication with Thomsen that weekend. *Id.* at 84.

Ricciardi testified that after Thomsen eventually gave him a copy of the Dimon letter, Thomsen said something to the effect of, "I know you are unhappy with me issuing this letter." *Id.* Ricciardi testified that he responded to Thomsen saying:

> Linda, I am your Deputy, I am trying to keep you out of trouble. I am trying to provide you with the best advice that I can give to you. If I am not involved, I cannot help you. I cannot function as your

> Deputy if I am not included when issues come up, to assist you through them.

Id.

Ricciardi emphasized that he was not critical of Enforcement's involvement during the weekend in the JPMorgan acquisition, but that there were procedural steps that could have been taken to avoid any appearance problem with the result. *Id.* at 96. Ricciardi testified that his exclusion from the process that weekend was one of the reasons he ultimately left the agency. *Id.* at 111.

II. On Monday, March 17, 2008, Thomsen Informed Enforcement Staff About the Events of the Preceding Weekend and Met with the Staff Regarding the Ongoing Investigations of Bear Stearns

At the time, Enforcement held a senior staff meeting every Monday morning that included all Enforcement staff at the branch chief level and above. During the regularly scheduled meeting on March 17, 2008, Thomsen announced that she had an exciting weekend because JPMorgan was buying Bear Stearns, JPMorgan had asked for assurances, and she had sent a letter regarding that request to JPMorgan. Ricciardi Tr. at 84.

OIE Staff in the Office of Internet Enforcement, testified that at the March 17, 2008 senior staff meeting, "I recall Ms. Thomsen communicating a message to the effect if you have any Bear Stearns-related investigations, talk to the chief counsel as they may no longer be something we want to put a lot of resources into if, you know, there's not going to be a Bear Stearns." Transcript of Testimony of OIE Staff Tr."), January 21, 2009, attached hereto as Exhibit 35, at 10.

After the senior staff meeting, at 1:00 p.m. on March 17, 2008, Thomsen held a conference call and a second meeting in her office with all of the staff that were involved in Bear Stearns-related investigations. Chion Tr. at 16. Thomsen testified that she would be surprised if any Enforcement staff walked away from that meeting thinking that any Bear Stearns cases were over. Thomsen Tr. at 49. Thomsen testified, "It was not the message I intended to deliver." *Id.*

During that meeting Thomsen relayed to the staff that she had provided a letter to JPMorgan which stated in effect, "We're going to consider the facts and circumstances as we usually consider facts and circumstances, applying certain principles and addressing it." *Id.* Chion testified that Thomsen described the letter and basically said it does not really change anything, with Thomsen adding, "Go out and do your investigations." *Id.* at 18. Chion believed that JPMorgan had not received any assurances and she continued to pursue her Bear Stearns investigation. *Id.* at 16.

ENF AD 1 Assistant Director in Enforcement, also testified about the second meeting with Thomsen on Monday in her office. ENF AD 1 at 28. ENF AD 1 testified that everyone from Enforcement who had a Bear Stearns-related investigation was invited. *Id.* Staff from the regional offices telephoned in, and ENF AD 1 believed the meeting was attended by all of the senior staff. *Id.* The meeting was called to discuss what impact the collapse of Bear Stearns would have on the SEC staff's investigations. *Id.* ENF AD 1 testified that each staff person talked about their investigations. *Id.* During the meeting, Thomsen stated that she had sent a letter to JPMorgan and that no assurances had been given. *Id.*

Additionally, ENF AD 1 testified that the staff was told by Thomsen, "Keep doing your work, do your investigations, and take them where ever they lead" and that the ultimate decision on whether to recommend actions against JPMorgan would be made on a "case-by-case" basis. *Id.* at 28. ENF AD 1 testified that his "take away" from that meeting was to proceed with "business as usual." *Id.* at 29.

ENF AD 5 an Assistant Director in Enforcement who had two cases related to Bear Stearns at the time of the acquisition, testified that at the second meeting on Monday, March 17, 2008 with the staff, someone asked Thomsen, "To the extent we have these Bear Stearns investigations, how should we proceed?" Transcript of Testimony of ENF AD 5 November 3, 2008, attached hereto as Exhibit 36, at 5-8, 17. ENF AD 5 testified that Thomsen responded, "Just keep doing the investigations as you were before." *Id.* He said he came out of that meeting with Thomsen thinking, ". . . we were going to continue on the same path," and added that no one said to hold back or stop his investigations.[9] *Id.*

Notes taken by an Assistant Regional Director at the Philadelphia Regional Office ("PLRO") during the second meeting, however, showed that Thomsen indicated that they cannot

[9] Other Enforcement staff who attended that second meeting had similar recollections. ENF AD 3 an Assistant Director in Enforcement, testified that the purpose of the meeting was for Thomsen to tell staff who had ongoing Bear Stearns investigations about the guidance that she had given to JPMorgan regarding Enforcement investigations. Transcript of Testimony of ENF AD 3 November 8, 2008, attached hereto as Exhibit 37, at 11-12. ENF AD 3 recalled that Thomsen said she had drafted a letter after consulting with various people and that the letter explained to JPMorgan that Enforcement would review any investigations based on the Seaboard and penalty factors. *Id.* at 13.

According to SEC staff attorne ENF Staff Atty 5 notes and recollection, on March 17, 2008 at around 1 p.m., there was a meeting in Thomsen's office for Enforcement staff working on matters relating to Bear Stearns. Exhibit 38. At the meeting, Thomsen informed the staff that JPMorgan had contacted her over the weekend and had requested assurances that the SEC would not sue JPMorgan for pre-merger activities of Bear Stearns. *Id.* wrote in his memorandum from his notes of the meeting, "[Thomsen] explained at the meeting that she did not give them that relief and told them that in any investigation the staff or the Commission conducts, we could never say what would happen before the case is over, i.e. [sic] whether a case would be brought at all, or if so, what it would entail." *Id.* ENF Staff Atty 5

give JPMorgan amnesty, but "could provide soft oral comfort b/c seems unlikely would pursue JPMorgan for Bear Stearns statements on liquidity." Exhibit 39.

III. The SEC's Public Disclosure of the Dimon Letter

A. On Tuesday, March 18, 2008, the SEC Issued a Press Release Regarding the Dimon Letter

On 2:00 pm on Tuesday, March 18, 2008, the SEC issued a press release about the SEC's role in the JPMorgan/Bear Stearns transaction. Exhibit 40. The release included the topic, "Did the SEC staff play any role in the Bear Stearns/JPMorgan transaction?" *Id.* The release discussed the actions Enforcement took related to the transaction. Specifically, it stated:

> The Division of Enforcement wrote a letter concerning investigations and potential future inquiries into conduct and statements by Bear Stearns before the public announcement of the transaction with JPMorgan, in which it declined to provide assurances about possible future enforcement actions. The letter states that reaching conclusions about those inquiries would be premature. In the letter, the Division confirmed that, consistent with prior statements and guidance by the SEC, the staff would favorably take into account the circumstances of the JPMorgan acquisition of Bear Stearns when considering whether to recommend enforcement action against JPMorgan arising out of statements made by Bear Stearns in the 60 days before the public announcement of the merger.

Id.

The OIG's investigation revealed that the SEC's Office of Public Affairs ("OPA") sent the release to the Chairman and Commissioners and other senior SEC officials for comment at 1:35 p.m. on March 18, 2008, with the subject line, "Internal Prerelease Distribution," stating, "We plan to issue this press release at 2 p.m." Exhibit 41. According to [OPA Staff #1] of OPA, the standard procedure is to send a draft to the Commissioners and their staff thirty minutes to an hour before any document is released to the public. Memorandum of Interview of [OPA Staff #1] May 14, 2009, attached hereto as Exhibit 42.

The OIG found no evidence that anyone responded to OPA's e-mail before the press release was issued.[10]

B. Seven Months Later, the SEC Publicly Released the Dimon Letter

The Dimon letter was made public on October, 22, 2008. Exhibit 43. OPA Staff #2 in the OPA, told the OIG that he had received an e-mail from David Scheer, a reporter from Bloomberg, on October 22, 2008, requesting a copy of the Dimon letter. Memorandum of Interview of OPA Staff #2 Interview Memo"), June 8, 2009, attached hereto as Exhibit 44.

After receiving Scheer's request OPA Staff #2 e-mailed John Nester, Director of OPA, Consultant then communications consultant to the Chairman, and William Schulz, Director of the Office of Legislative and Intergovernmental Affairs, informing them of Scheer's request. Exhibit 45. OPA Staff #1 then contacted Richard Humes, Associate General Counsel, and Thomsen regarding the request. Exhibit 44. Humes, Thomsen and Consultant decided to release the letter to be posted to the SEC's public website. *Id.* Thomsen provided OPA Staff #2 with a copy of the letter, which he then faxed to Scheer. *Id.* OPA Staff #2 believed that the staff decided to publish the letter because, in part, they felt that the actual letter was no more detailed than the March 18, 2008 press release. *Id.* The OIG found no evidence that the Commissioners were involved in the decision to release the Dimon letter, or even informed of its release in advance.

IV. The OIG's Findings

A. JPMorgan Did Not Receive the Assurances it Requested

The OIG investigation found no evidence that Thomsen gave Cutler the broad and specific assurances he sought that in connection with any ongoing or future investigations of Bear Stearns' conduct. As discussed above, the OIG did find evidence that Thomsen had been initially "comfortable" giving Cutler the assurances he sought before she consulted with the SEC's Office of General Counsel. Cartwright Tr. at 32-33. The OIG also found that the SEC's General Counsel and Deputy General Counsel chose not to participate in conversations with Cutler with the specific purpose of allowing Thomsen the flexibility to make soft oral assurances. *See* Vollmer Tr. at 79; Cartwright Tr. at 58-59. However, Thomsen and Cutler testified that ultimately JPMorgan was given no more assurances than were contained in the Dimon letter.

[10] Thomsen testified that she had input into the language used in the release. Thomsen Tr. at 44-45.

B. Thomsen Did Give Cutler Some Comfort Regarding the Outcome of Ongoing Bear Stearns' Investigations and Assurances that Enforcement Would Not Recommend Action Against JPMorgan Related to Bear Stearns' Conduct During the 60 days Prior to the Acquisition.

As discussed above, while JPMorgan did not receive the blanket assurances of no Enforcement liability associated with Bear Stearns that it sought, it did receive some assurances regarding (1) its potential liability with respect to ongoing investigations of Bear Stearns and (2) the possibility of Enforcement opening an investigation of JPMorgan, as the successor entity, based on statements by Bear Stearns officers during the 60 days prior to the acquisition. The language of the Dimon letter regarding these two issues is somewhat convoluted and obtuse, perhaps intentionally so,[11] but a clear statement of the relief that the staff gave JPMorgan regarding potential Enforcement liability associated with Bear Stearns' conduct is found in the March 16, 2008 e-mail that Sirri sent Chairman Cox and Commissioners Casey and Atkins. Sirri described the relief provided as follows:

> [Enforcement] stated that it could not come to final decisions regarding actions regarding Bear as the investigations were still in process. It offered comfort to JPM that it understood the circumstances of the JPM acquisition and that it would consider those circumstances in deciding whether it would recommend action against JPM for past misdeeds of Bear. It also stated that it was unlikely to recommend action against JPM arising out of statements made by Bear in the 60 days prior to the public announcement of the proposed acquisition by JPM.

Exhibit 23.

Several of the witnesses who testified in the OIG investigation testified that the comfort that was given JPMorgan was extraordinary and something the staff was prohibited from providing in normal circumstances. *See* Vollmer Tr. at 107; Cartwright Tr. at 33; Ricciardi at 78, 81-83. For example, Vollmer testified there was no precedent for the "extraordinary circumstances of that weekend" and the relief provided "was not something we would normally do." Vollmer Tr. 107. Vollmer added, "In fact, we would strongly resist in the normal course of events" providing any comfort

[11] Ricciardi testified that "Linda was trying to give [JPMorgan] some assurance ... , but in a way, as she said to the senior staff at the meeting, all she was telling them is what the rules are ... with regard to how [the SEC] assess[es] penalties." Ricciardi Tr. at 98. *See also*, Vollmer Tr. at 79 (The "goal was to be helpful but in a most minimal way, that is, to do the least amount to be helpful for the transaction.").

about a future Enforcement investigation. *Id.* Similarly, Cartwright noted the SEC acceding to JPMorgan's request for relief was "an extraordinarily unusual action." Cartwright Tr. at 33.

In addition, Ricciardi noted how unusual it was for Enforcement to provide any information about an ongoing investigation testifying, ". . . enforcement investigations are confidential. You are not allowed to discuss confidential enforcement investigations with third parties." Ricciardi Tr. at 78. Ricciardi further testified about the unique circumstance of company merger and acquisitions, "The company may have a legal obligation to disclose to a potential merger partner everything they know about the investigation. That does not give the staff the authority to relay that information to the purchasing company." *Id.* at 89. However, the staff involved in the decision to provide that relief, testified that they believed the extraordinary circumstances of that weekend warranted the relief. Cartwright Tr. at 47; Vollmer Tr. at 107.

C. The Existing Bear Stearns Investigations Were Not Impacted by Cutler's Communications with Thomsen

The OIG investigation found that no investigation of Bear Stearns that was ongoing in March 2008 was impacted as a result of the Dimon letter or of Thomsen's other communications with Cutler during the March 15-16 weekend. Ricciardi, who as discussed above was critical of the process related to those communications, testified that he would be very surprised to hear that Bear Stearns cases were not aggressively pursued after that weekend. Ricciardi Tr. at 114. There were, however, concerns expressed by Enforcement managers that cases against Bear Stearns would be more difficult to bring under these circumstances. *See* Friestad Tr. at 116; Chion Tr. at 35-36; OIE Staff [redacted] at 10. But the OIG found no evidence that investigations of Bear Stearns were slowed or halted by the events of that weekend.

Thomsen testified that, as a general matter, there would be very little effect on an ongoing investigation during the fact-gathering phase if an entity no longer existed. Thomsen Tr. at 20 & 21-22. However, Thomsen acknowledged that it is often more difficult to get information from an entity that no longer exists. *Id.* at 55. Thomsen explained that the entity's status was more relevant at the point of deciding what persons, if any, the staff would recommend an Enforcement action against. According to Thomsen, the SEC has sued successor entities in the past. *Id.* at 54. Thomsen said the overwhelming factor in determining whether to sue an entity depends on the underlying conduct. *Id.* at 53.

Even though Thomsen testified that the Seaboard factors and the Commission's guidance on penalties would generally guide Enforcement's decision whether to recommend an action against a successor entity, Thomsen acknowledged that those policies have nothing to do with whether there is a successor entity. *Id.* at 19; 51-53.

The most significant of the Bear Stearns investigations that was ongoing at the time of the acquisition resulted in a civil case filed by the SEC against two individuals on June 19, 2008. Exhibit 46; Ricciardi Tr. at 76. The SEC's civil case alleges that two of Bear Stearns Asset Management (BSAM) portfolio managers misled investors about the financial state of the firm's two largest hedge funds. That civil case and a parallel criminal case are pending. *See* Unidentified Senior Enforcement Official Tr. at 8.

Although the SEC did not sue JPMorgan in that matter for the pre-acquisition conduct of the two Bear Stearns portfolio managers, the staff testified that it did consider whether to include JPMorgan in the action before it was filed, but decided against suing JPMorgan at that time based upon the facts of the case. In June 2008, the SEC staff afforded counsel for JPMorgan an opportunity to meet with the staff and present, in part, counsel's arguments for not including JPMorgan in the action against the two individuals. Friestad Tr. at 101; Exhibit 38. Friestad testified he believed this meeting indicated it was "extraordinarily unlikely" that Thomsen had given JPMorgan some assurance that it would not be sued in matters related to Bear Stearns. *Id.* Friestad explained, "That would have struck me as very bizarre that they were going through some charade of a meeting, trying to convince us not [to] sue them, if they felt that they had some ace up their sleeve to stop us from going ahead." *Id.* at 101.

An Unidentified Senior Enforcement Official testified that the staff had subsequent meetings to discuss whether to make recommendations against any entities and, "Nobody has said not to bring a case, and we haven't made a decision yet what to do." Unidentified Senior Enforcement Official Tr. at 15. However, Friestad testified that it was "relatively obvious" that bringing any case involving Bear Stearns was going to be "exceedingly difficult," irrespective of the Dimon letter or any other communications between Thomsen and Cutler. Friestad Tr. at 117. Friestad testified:

> . . . it was not lost on people that the changed circumstances were going to affect how we made our judgments about whether to proceed or not. I mean . . . we didn't have to hear from JPMorgan to know that there were potential issues about bringing a case . . . against Bear Stearns under those circumstances.

Id. at 116.

In the telephone interviews we conducted of other Enforcement staff working on Bear Stearns related matters, we learned that none of those investigations were affected by the Thomsen/Cutler communications that weekend. Exhibit 47. During the course of the OIG investigation, we developed a list of all Bear Stearns cases pending in March 2008, where Bear

Stearns was a direct or related party in those investigations. According to the SEC's internal case tracking database the Name Relationship Search Index, there were [Law Enforcement] active investigations prior to the March 16, 2008, JPMorgan/Bear Stearns transaction (of those investigations, nine were opened in the 1990's). The OIG interviewed twenty-three SEC Enforcement staffers. The OIG took sworn, on-the-record testimony of seven individuals and interviewed sixteen additional staff members by phone or in person. Those individuals from whom we received testimony or interviewed were responsible for approximately twenty Bear Stearns related investigations.

In all, the OIG did not find that any investigation related to Bear Stearns was stopped or altered because of any communications between JPMorgan and the SEC during that weekend. If JPMorgan's acquisition of Bear Stearns had any effect on those investigations, it appears that the effect was related to the mere fact of the acquisition, and not to any specific assurances that Thomsen gave Cutler.

D. Other Enforcement Staff Should Have Been Included on the Matter

As discussed above, the policy regarding external communications is designed to "ensure that external communications between senior officials (at the Associate Director level and above) and persons outside the SEC are handled with the appropriate care, sensitivity and transparency." Exhibit 1. Arguably, the policy did not apply to the communications Thomsen had with Cutler related to the JPMorgan/Bear Stearns transaction because no specific investigation was discussed and it involved an extraordinary, urgent situation. However, as discussed below, the OIG investigation found Thomsen's failure to include other appropriate officials in those communications contributed to an already serious, general perception among Enforcement staff that certain individuals outside the Commission have special access and influence with senior Enforcement officials. In this specific instance, Thomsen's actions contributed to a perception that Cutler and JPMorgan were given assurances regarding the outcome of the staff's pending investigations.[12]

The perception that certain outside individuals wield undue influence with senior Enforcement officials is evidenced by the anonymous letter that precipitated this OIG investigation. The content of that letter indicates that it was sent by a member of the Enforcement staff. The October 7, 2008 anonymous letter to the OIG about this matter alleged that Cutler called Thomsen to get assurances and inside information "gotten through a personal relationship." Exhibit 48. The letter continued, "This additional information goes to the heart of the problems

[12] The OIG notes that Thomsen was not advised to include other Enforcement staff. *See* Cartwright Tr. at 43-44 and Vollmer Tr. at 64-65. In addition, Thomsen did follow the external communications policy by quickly reporting the details of her communications with Cutler to the Enforcement staff assigned to Bear Stearns related matters the next business day, as discussed above.

that you correctly focused on" . . . "in the report issued about how the Pequot investigation was mishandled by the SEC enforcement division." *Id.*

Even Ricciardi shared, to some extent, that perception. When he reached out to Thomsen on Sunday, March 16, 2008, and learned that she had been talking to JPMorgan, although she "didn't say who she was talking to, [he] thought there was a chance that she was talking to Steve Cutler . . . [b]ecause Steve was her boss, and Steve got her promoted to Deputy Director." Ricciardi Tr. at 79.

Ricciardi testified that while he was the Deputy Director of Enforcement, he "knew the staff had concerns about senior level contact." *Id. at* 78. Ricciardi explained it had been his practice when contacted by counsel for the subject of an investigation to listen to that person but "never give them guidance." *Id.* Then, according to Ricciardi, he would go talk to the staff working on the matter and they would call back the attorney together. *Id.* at 79. Ricciardi testified that after the Pequot controversy, discussed above at footnote 4, he urged that his practice be adopted as a formal policy for Enforcement. *Id.* Ricciardi testified further that "some [Enforcement officials] resisted his recommendation, but "the Chairman sided with me, and we issued a formal policy." *Id.*

McKown also acknowledged that the staff has "perceptions and concerns" that "certain members of the defense bar or outsiders" have influence within Enforcement. Transcript of Testimony of Joan McKown, May 4, 2009, attached as Exhibit 49 ("McKown Tr.") at 110-111. McKown testified that she did not believe "there is truth to it happening," but testified "that is a perception" and she did not want to "diminish[]" the staff's concerns. *Id.* at 111. McKown testified that is, in part, that perception was the reason Enforcement issued the external communications policy. *Id.*

The OIG obtained during its investigation an e-mail exchange among [redacted] Enforcement staff that further evidences the perception that certain outside individuals wield undue influence over the outcome of Enforcement actions. The e-mail exchange began on June 22, 2007, with ENF Employee A emailing certain persons regarding the transfer of [redacted] an investigation of Bear Stearns [redacted]. Exhibit 50.

On March 18, 2008 ENF Employee C [redacted] forwarded this e-mail to Scott Friestad, who was an Associate Director of Enforcement at the time,[13] and ENF Employee A [redacted] with the comments:

[13] Friestad was subsequently promoted to Deputy Director of Enforcement, but is currently an Associate Director in Enforcement.

ENF Employee A once again proves s/he is smartest ... [f]or avoiding an investigation against a defunct entity!!!!

Id.

ENF Employee A responded:

Yes. Exactly my point.

Id.

Friestad asked:

You don't think [the other group with the Bear Stearns investigation is] going to bring a blockbuster case??

Id.

ENF Employee C replied:

LOL!! Read yesterday's release - - Enforcement sent JP Morgan a letter saying the investigations were essentially over!!

Id.

Friestad responded:

I wonder what happened behind the scenes to engineer that result.

Id.

ENF Employee A opined:

Juce?

Id.

Friestad added:

SC?

Id.

ENF Employee A responded:

> That's funny, Scott. We all know how wrong that would be.

Id.

ENF Employee C testified that his/her statement that ENF Employee A looked smart was based on his/her understanding, [redacted] investigations were now going to be essentially stopped." [redacted] at 21 ENF Employee C testified that the e-mail exchange was their speculation that Bear Stearns investigations would be stopped as a result of Thomsen's conversations with Cutler and that ENF Employee A statement that "[w]e all know how wrong that would be" implied that those conversations and the result were inappropriate. *Id.* ENF Employee C further testified that the e-mail exchange was based on their belief "that there was a special relationship between [Thomsen] and [Cutler] and that that was probably an asset to facilitate the smooth transition of Bear to JPMorgan that weekend." *Id.*

ENF Employee C testified that ENF Employee A reference to "Juce" as the explanation for "what happened behind the scenes to engineer that result" referred to the relationship between Cutler and Thomsen. *Id.* at 29. The OIG believes that "Juce" was a reference to an infamous e-mail that was circulated in the Pequot investigation and referred to a particular defense attorney that had called Thomsen directly as having "juice."[14]

Friestad testified that he did not recall this e-mail exchange. Friestad Tr. at 61. He testified that he believed ENF Employee A reference to "Juce" was to an e-mail in the Pequot investigation that "[p]eople have suggested … means an ability of some people in [the] defense bar to have special access or special ability to get results for their clients." *Id.* at 94-95. He also testified that he believed his reference "SC" was to Steve Cutler. *Id.* at 95. However, Friestad also testified that the only discussions he could recall about whether the outside defense bar had influence was "sort of a general sense of people believing that that's not the case, that people don't believe people are making secret side deals or feel subject to undue influence, or that people are getting special treatment because of who they are." *Id.* at 103.

---

[14] That infamous email, sent on August 4, 2005, by a Branch Chief to the staff attorney who was later fired, stated, in part, "Mack's counsel will have 'juice' as I described last night – meaning that they may reach out to Paul [Berger] and Linda [Thomsen] (and possibly others)." *See also* ENF Employee C at 34-35 (testifying that s/he associates the word "juice" with the Pequot report); Friestad Tr. at 94 (testifying that he believed ENF Employee A reference to "Juce" referred to an e-mail in the Pequot investigation); McKown Tr. at 110 (testifying that her "take" on the e-mail exchange was that "Juce" referred to the Pequot investigation and the exchange suggested that Cutler "cut a deal").

ENF Employee A testified under oath that s/he did not recall this e-mail exchange and s/he had no idea what the reference to "Juce" meant. Transcript of Testimony of ENF Employee A date attached hereto as Exhibit 51 at 20, 22, 27-29 & 41. ENF Employee A suggested that the reference to "Juce" was a reference to ENF Employee B *Id.* at 22-23. ENF Employee A testified that:

> I remember the word "juice" became a word that was widely discussed because everybody I know thinks that it's ridiculous that people would think that people get special treatment. I've been here Personal Privacy and I've never seen anybody get special treatment from the Division of Enforcement. Quite the contrary.

Id. at 24.

The OIG did not find ENF Employee A testimony to be credible. The OIG interviewed ENF Employee A date Memorandum of Interview of ENF Employee A Interview Memo") date attached hereto as Exhibit 52. During that interview, ENF Employee A claimed to the OIG that s/he did not remember the e-mail exchange. *Id.* & McKown Tr. at 105. ENF Employee A repeated this claim date in sworn, on-the-record testimony before the OIG. ENF Employee A at 20. However, a few days before the interview with the OIG, ENF Employee A spoke with McKown about the investigation and specifically discussed this e-mail exchange ENF Employee A at 37; McKown Tr. at 102-103. During that discussion, McKown testified that she believed ENF Employee A told her that s/he recalled the e-mail exchange. McKown Tr. at 105.

Moreover, ENF Employee A suggestion during testimony that the reference to "Juce" was a reference to ENF Employee B is not credible in light of the context. Nevertheless, the OIG contacted ENF Employee B who testified that s/he had nothing to do with Bear Stearns cases nor could s/he have possibly had any influence in the events related to JPMorgan's acquisition of Bear Stearns. Transcript of Testimony of ENF Employee B date attached hereto as Exhibit 53, at 12-13 & 21.

As discussed above, the OIG found no evidence that JPMorgan received special consideration due to Cutler's relationship with Thomsen. However, Thomsen's failure to include other Enforcement staff in the events preceding her sending the Dimon letter contributed to an already existing perception within Enforcement that some individuals outside the SEC wield undue influence over the conduct and outcome of Enforcement investigations. As Ricciardi acknowledged, that perception in itself is a significant concern. Moreover, and as discussed above, approximately one month before Thomsen's communications with Cutler, Enforcement

had adopted a formal policy governing communications regarding investigations with third parties primarily as a result of that perception.

In light of that perception and Thomsen's relationship with Cutler, it would have been advisable for Thomsen to have involved other Enforcement staff, particularly Chion and perhaps Ricciardi, before sending the Dimon letter. The inclusion of other Enforcement staff would have served the stated purpose of the best practices that Thomsen herself implemented – "to ensure that external communications between senior officials (at the Associate Director level and above) and persons outside the SEC are handled with the appropriate care, sensitivity and transparency." Exhibit 2 at 1.

E. Enforcement's Letter to JPMorgan Disclosed Fact of Ongoing Investigations Related to Bear Stearns

As noted above, the SEC's rules and regulations regarding disclosure of non-public information essentially prevent SEC staff from disclosing information and documents obtained during its investigations unless the Commission authorizes its disclosure. Enforcement investigations are, to the extent possible, non-public and Enforcement policy is that its investigations are neither confirmed nor denied to non witnesses or parties. *See* Exhibit 4. The rules further state that "Unless otherwise ordered by the Commission, all formal investigative proceedings shall be non-public." 17 C.F.R. 203.5.

As discussed above, the March 16, 2008 letter from Linda Thomsen to JPMorgan Chairman and CEO James Dimon stated, among other things, "*As for any investigations* and potential future inquiries into BSC's pre-announcement conduct, it is impossible to conclude whether any violations of law have occurred, by whom and, if so, what actions remedies and sanctions, if any, are appropriate." Exhibit 22. The letter also stated, "In addition, nothing in this letter should be construed as reaching any conclusion as to the underlying merits *of any of the matters currently under investigation* or those that may be investigated in the future." *Id.* (emphasis added).

Thomsen, Cartwright and Vollmer testified that they did not believe the letter sent to Dimon disclosed non-public information but each conceded the letter came close to disclosing the non-public information of the fact that there were ongoing investigations into Bear Stearns. Others, however, testified that the letter clearly appeared to confirm there were ongoing investigations into Bear Stearns.

Thomsen testified that the first sentence referenced above which includes the language, "As for any investigations," from the Dimon letter can be read as "not confirming that there's

anything in particular." Thomsen Tr. at 42. As for the second above-referenced sentence, however, Thomsen admitted, ". . . that probably more clearly suggests that there are current investigations." *Id.* She added, however, that she did not believe this disclosure violated Commission policy. *Id.* Thomsen testified that there was some debate within OGC as to whether the letter disclosed non-public information, but her view was "absolutely not as to sending it to JPMorgan." *Id.* at 41. When asked why there was no issue with suggesting that there were ongoing investigations into Bear Stearns to JPMorgan, Thomsen testified partly because JPMorgan already knew there were ongoing investigations[15] and partly because Bear Stearns would soon become part of JPMorgan. *Id.* at 41.

Cartwright was much less clear in his testimony about whether the letter disclosed non-public information and claimed it was a "complex legal issue" of whether the Enforcement Director had the right to share non-public information with a third party. Cartwright Tr. at 49. When asked whether the first above-referenced sentence which included "as for any investigations" it disclosed that there were ongoing investigations, Cartwright testified, "I don't think that was the intention." *Id.* at 72. He added, "I don't think this is designed to say anything one way or the other about the current status of anything." *Id.* Later in that same line of questioning, Cartwright responded to the questions, "But is there anything in this letter that could be deemed as releasing information to third party JPMorgan that's being [sic] non-public?" by testifying, "I really don't think so." *Id.* at 75.

According to Vollmer, a topic of conversation internally that weekend was avoiding saying anything to JPMorgan because the OGC's view is that the existence or not of an investigation is confidential. Vollmer Tr. at 66. He added that the effort was to achieve neutrality in the letter as to whether there were investigations. Vollmer Tr. at 66-67. But, according to Vollmer, there was "an air of unreality to it" since they believed JPMorgan already knew about ongoing investigations into Bear Stearns. Vollmer Tr. at 102.

According to Vollmer, his memory is that they added the word "any" before ongoing investigations to take away from actually confirming in the letter that there were in fact ongoing investigations. *Id.* at 101. When asked if they missed something before the second reference to "any of the matters currently under investigation," Vollmer testified, "Maybe." *Id.* at 105. He added that they believed that JPMorgan already knew about the existence of ongoing investigations into Bear Stearns, so that this exercise of trying to stick to the rules of not disclosing non-public information essentially became form over substance. *Id.* at 105.

[15] However, as noted earlier, Cutler testified, "I didn't have any particular understanding of any particular matter or investigation." Cutler Tr. at 21.

When asked about what authority there was for telling a third party the SEC was not likely to recommend an action against it, Vollmer testified, "I don't know of any precedent. But this is ... our acknowledgment of the extraordinary circumstances of that weekend." *Id.* at 107. He added that they would normally resist this in the normal course. *Id.* Vollmer concluded his testimony by saying that he thought that what staff did that weekend was "creative, appropriate and professional" in the circumstances and did not cross any ethical or legal lines. *Id.* at 119-120.

Daniel Gallagher, who was Counsel to Chairman Cox in March 2008 and an advisor to the Chairman on issues related to Enforcement, testified that, to his surprise, he was not involved in the events of that weekend when JPMorgan acquired Bear Stearns. Transcript of Testimony of Daniel Gallagher, March 6, 2009, attached hereto as Exhibit 54 ("Gallagher Tr.") at 19-20. According to Gallagher, it appeared that the Dimon letter confirmed that, in fact, there were ongoing Enforcement investigations. *Id.* at 26. He further testified, that someone would have gotten comfort making this sort of disclosure. *Id.* at 27. Gallagher added, ". . . all I can say is it would not be normal to disclose the existence of an investigation without some sort of approval." *Id.* at 28.

Ricciardi, former Deputy Director of Enforcement, testified in his view the Dimon letter was potentially violative of the Commission's rules in several regards. First, Ricciardi thought the letter revealed a confidential Enforcement investigation to a third party. Ricciardi Tr. at 85. Second, making the Dimon letter publicly available would violate the rule against providing non-public information, and he believed the press release itself provided non-public information. *Id.* at 86.

Thomsen did involve Ricciardi in looking at a draft of the public press release and he spotted the issue that the Dimon letter disclosed confidential Enforcement investigations to a third party in violation of the Commission's rules. *Id.* at 85. On March 18, 2008, Thomsen sent an e-mail to Sirri, copying Cartwright and Ricciardi, saying:

> Upon reflection Brian and I have concluded we should NOT make my letter public as it can be read as disclosing that we have ongoing investigations. The Q and A comes close but is less revealing. Thanks to [Ricciardi] for being a great issue spotter.

Exhibit 55.

According to Ricciardi, who also was not involved in the events of that weekend, the proper procedure was to obtain the Chairman's approval, who has duty officer authority to approve it, or go to the full Commission for approval. *Id.* at 85-86. Ricciardi further testified it

was irrelevant what JPMorgan knew about the investigations because the staff does not have the authority to relay non-public information. *Id* at. 89.

Sirri also acknowledged that the Dimon letter states that at least one investigation is ongoing. Sirri Tr. at 57. Sirri added that generally at the SEC "we all never confirm or deny investigations." *Id.*

Chairman Cox, in his April 16, 2008 responses to questions from the Senate Committee on Finance about the Bear Stearns/JPMorgan transaction stated, "The Commission does not disclose the existence or non-existence of an investigation or information generated in any investigation unless made a matter of public record in proceedings brought before the Commission or the courts." Exhibit 4, at 6.

As discussed above, our investigation revealed that initially it was determined that the Thomsen letter to JPMorgan should not be added to the March 19, 2008 SEC's Frequently Asked Investor Questions Regarding The Bear Stearns Companies, Inc. on the SEC's public website because it disclosed non-public information about the existence of Enforcement investigations into Bear Stearns. But several months later, on October 22, 2008, the letter was added as a link to that release on the public SEC website after the agency received press inquiries about it earlier that day. Exhibit 43. This occurred even though it was decided that the letter "could be read as disclosing that we have ongoing investigations." It is unclear who, if anyone, carefully reviewed this press release, and ultimately the letter to JPMorgan was distributed to reporters and the public.

While the SEC's involvement in the JPMorgan/Bear Stearns transaction presented unique and urgent circumstances, this investigation revealed the lack of clear agency guidance about the rules and regulations governing non-public information. As shown above, staff have different views about whether the letter to JPMorgan in fact disclosed that there were ongoing investigations into Bear Stearns at the time and whether it was appropriate to be disclosing that information to JPMorgan, and later the public, without some type of Commission approval. According to Cartwright, there are a number of Commission rules relating to non-public information and, "They are somewhat complex in their construction, and they're susceptible to various interpretations." Cartwright Tr. at 51.

In addition, other staff we took testimony of also had different views of whether non-public information was given out in Enforcement's letter and what the Commission's policy is on disclosure of non-public information. For example, McKown testified it was not clear what non-public information was given out since the letter did not spell out specific investigations. McKown Tr. at 30. McKown further testified that Thomsen was not giving JPMorgan

information they did not already have. *Id.* at 31. McKown said there could be an exception to disclosing non-public information if it was deemed prudent in a particular situation. *Id.* at 33.

Friestad testified that generally staff can say very little, if anything, about pending investigations to third parties, and he was not sure if that policy was written somewhere. Friestad Tr. at 28. Friestad said there were limited exceptions to that policy and that it is determined on a case-by-case basis where to draw the line on disclosing non-public information. *Id.* at 28-31. According to Friestad, as a practical matter he believed the Commission had an epic or national disaster exception to not releasing non-public information, which he believed was applicable in the JPMorgan/Bear Stearns transaction. *Id.* at 56.

Furthermore, there was disagreement about whether the public disclosure of that letter on the Commission's public website violated the Commission's rules about disclosing non-public information and whether, and to what extent, the Commission needed to approve that disclosure. As discussed above, it was initially determined that the letter came too close to disclosing that there were ongoing investigations into Bear Stearns and, therefore, the letter should not be publicly disclosed. Thomsen and others disagreed with that view and ultimately the letter was publicly disclosed. As noted above, this was done without Commission approval and it is unclear to the participants whether that approval was required.

And, as referenced above in the section outlining the applicable rules and regulations governing release of non-public information, the rules and regulations provide some discretion to senior officials and some delegated authority to the General Counsel. For example, Rule 19-1 states, in part, "The prohibition against use of non-public information or documents without specific authorization or approval by the SEC does not apply to the use of such materials as necessary or appropriate by members of the staff in pursuing SEC investigations or examinations, or in the discharge of other official responsibilities." There appear to be no guidelines as to what this discretion allows.

Conclusion

In all, the OIG investigation found no evidence that Thomsen gave information about any specific Enforcement investigation or provided broad assurances about ongoing investigations related to Bear Stearns. Nor did the OIG find that any Bear Stearns related investigation was impacted as a result of the Thomsen/Cutler communications or the events of that weekend. The OIG did find, however, that some comfort regarding the outcome of ongoing Bear Stearns' investigations was provided and assurances that Enforcement would not recommend action against JPMorgan during the 60 day pre-acquisition period were given. Moreover, the OIG found that Enforcement staff have the perception that former high-level officials have greater access and influence within Enforcement.

We also found that Enforcement's letter to JPMorgan that weekend technically disclosed non-public information because it confirmed that there were ongoing investigations into Bear Stearns. In addition, there are also serious questions about the propriety of making this letter publicly available without approval of the entire Commission and in general, we found a lack of clarity with respect to the agency rules and guidelines relating to the disclosure of non-public information. The OIG also found that Thomsen and the General Counsel did not obtain formal Commission approval before making critical determinations about the viability of future Enforcement investigations. While we did not find any SEC rule or policy that mandated formal Commission approval, we found that there was also a lack of clarity of the circumstances in which Commission approval is required and the level of authority of SEC senior staff to make decisions that may bind the Commission.

Accordingly, we are referring this matter to the Office of the Chairman and the Director of Enforcement for actions consistent with the following recommendations:

(1) Clarification of the Commission's policies on the disclosure of nonpublic information, including: (A) what constitutes non-public information related to the existence of, or information about, Enforcement investigations and (B) what are the parameters for discretionary release by senior staff of non-public information;[16] and

(2) Clarification of the Commission's policies under what circumstances the staff is obligated to seek formal approval before making decisions that may bind the Commission.

Personal Privacy

Submitt [redacted] Date: 9/30/09

Date: 9/30/09

Concur [redacted] Date: 9/30/09

Approved: [signature] Date: 9.30.09

H. David Kotz

[16] It is important to note that the OIG made a similar recommendation in its September 30, 2008 ROI in Case No. OIG-431 regarding the allegations of former Enforcement attorney Gary Aguirre as described in footnote 4 supra.