107th Congress
2d Session

COMMITTEE PRINT

S. PRT. 107–83

ENRON'S CREDIT RATING: ENRON'S BANKERS' CONTACTS WITH MOODY'S AND GOVERNMENT OFFICIALS

REPORT

PREPARED BY THE STAFF

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

JANUARY 3, 2003

U.S. GOVERNMENT PRINTING OFFICE

83–604 PDF

WASHINGTON : 2003

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

COMMITTEE ON GOVERNMENTAL AFFAIRS

JOSEPH I. LIEBERMAN, Connecticut, *Chairman*

CARL LEVIN, Michigan
DANIEL K. AKAKA, Hawaii
RICHARD J. DURBIN, Illinois
ROBERT G. TORRICELLI, New Jersey
MAX CLELAND, Georgia
THOMAS R. CARPER, Delaware
MARK DAYTON, Minnesota

FRED THOMPSON, Tennessee
TED STEVENS, Alaska
SUSAN M. COLLINS, Maine
GEORGE V. VOINOVICH, Ohio
THAD COCHRAN, Mississippi
ROBERT F. BENNETT, Utah
JIM BUNNING, Kentucky
PETER G. FITZGERALD, Illinois

JOYCE A. RECHTSCHAFFEN, *Staff Director and Counsel*
CYNTHIA GOOEN LESSER, *Counsel*
RICHARD A. HERTLING, *Minority Staff Director*
GARY M. BROWN, *Minority Special Counsel*
DARLA D. CASSELL, *Chief Clerk*

CONTENTS

	Page
INTRODUCTION	1
BACKGROUND	2
Moody's Threatened Downgrade	3
The Response to Moody's Threatened Downgrade	3
Calls to Government Officials Regarding Enron's Credit Rating	7
Robert Rubin's Call to Peter Fisher	7
Calls to William McDonough	12
CONCLUSIONS	13
Influence or Pressure on Moody's	13
Rubin's Call to Fisher	14
Bankers' Calls to McDonough	16

APPENDIX

Appendix A: Memorandum from Peter Fisher to David Aufhauser, General Counsel, Treasury Department, November 8, 2001	19
Appendix B: Memorandum from Jack Maskell, Legislative Attorney, American Law Division, Congressional Research Service, to Senate Committee on Governmental Affairs, regarding Issues Concerning Post Employment, Revolving Door Laws and Former Secretary of the Treasury, December 16, 2002	20
Appendix C: Memorandum from Jack Maskell, Legislative Attorney, American Law Division, Congressional Research Service, to Senate Committee on Governmental Affairs, regarding Propriety of Informal Communication from Private Regulated Financial Entity to the Federal Reserve Bank, December 17, 2002	24

ENRON'S CREDIT RATING: ENRON'S BANKERS' CONTACTS WITH MOODY'S AND GOVERNMENT OFFICIALS

INTRODUCTION

The collapse of Enron Corp. on December 2, 2001 devastated thousands of its employees, many of whom lost not only their jobs but also their retirement savings, as well as investors who watched the value of their investment accounts evaporate. While corporations often fail, Enron's collapse was particularly shocking and problematic in part because of its size—it was then ranked as the seventh-largest corporation in America—and in part because it appeared that its rather sudden downturn could be traced to widespread fraud at the company. In January 2002, the Senate Governmental Affairs Committee launched a broad investigation into that collapse, focused on the role of government and other, private sector watchdogs, and what could have been done, if anything, to detect Enron's problems or to prevent its failure.

The full Committee [1] has since held five hearings and produced extensive staff reports, analyzing the roles played by key overseers of Enron, including the Securities and Exchange Commission, the Federal Energy Regulatory Commission, Wall Street equity analysts, and credit rating agencies. In connection with this investigation, questions have been raised about efforts by Enron's bankers to convince a credit rating agency, Moody's Investor Service ("Moody's"), not to downgrade Enron, and to convince government officials to intervene on behalf of Enron with Moody's. The Committee received calls to investigate these matters in the wake of certain press accounts, particularly those relating to a call regarding Enron that Robert Rubin, former Secretary of the Treasury, made to Peter Fisher, Under Secretary of the Treasury for Domestic Finance.

Chairman Lieberman and Ranking Member Thompson responded by asking Committee staff to determine what, if anything, was done by Enron's bankers to influence or pressure Moody's on Enron's behalf, and particularly what, if anything, was done by Enron bankers to obtain government intervention in aid of that effort. Majority and Minority Staff interviewed officials of Citigroup, [2]

[1] In addition, the Committee's Permanent Subcommittee on Investigations investigated and held hearings with respect to the roles of Enron's board of directors and financial institutions in Enron's collapse.

[2] Committee staff interviewed Michael Carpenter, former Chief Executive Officer, Citigroup Corporate and Investment Banking, and the Honorable Robert Rubin, Chairman of the Executive Committee and Member of the Office of the Chairman, Citigroup.

Moody's,[3] Enron,[4] the Treasury Department,[5] and the Federal Reserve Bank of New York[6] in an effort to reconstruct the pertinent events. Based on its findings, Committee staff asked experts at the Congressional Research Service ("CRS") to assess the legality of what had occurred. This report contains the findings of this investigation, and the conclusions of CRS.

Based on its investigation, Committee staff concludes that Moody's November 8, 2001 decision not to downgrade Enron's credit rating below investment grade was not based on improper influence or pressure, but on new information presented by financial institutions and others that in Moody's view changed Enron's circumstances. In addition, based on its investigation and opinions provided by CRS, Committee staff concludes that no improper influence was brought to bear by government officials on Moody's, and that the bankers who contacted government officials regarding Enron and its credit rating, including Rubin, did not act contrary to law.

BACKGROUND

The relevant events occurred during early November 2001. At that time, reports abounded that Enron was seeking a substantial equity investor or acquiror in order for the company to address its liquidity problems.[7] Enron already had drawn down its $3 billion line of credit with its banks on October 25, 2001.[8] By November 5, 2001, its credit rating had been lowered to just two notches above "junk" by Moody's and Standard & Poor's, and just one notch above "junk" by Fitch Ratings.[9] The dividing line between a "junk" credit rating and an "investment grade" credit rating was an important one for Enron: as Enron's former President, Greg Whalley, indicated in an interview with Committee staff, Enron's "business model [did not] exist below investment grade."[10] In other words, its investment grade rating was essential to its ability to enter into agreements with counterparties in the context of its trading operation, one of Enron's most profitable divisions; in addition, Enron had "triggers" tied to credit ratings in a number of agreements that, in the event of a downgrade, would have either constituted a default or would have required Enron to post significant amounts of cash collateral.[11]

---

[3] Committee staff interviewed John Rutherfurd, Chief Executive Officer, Moody's Corporation, and Debra Perry, Senior Managing Director for Corporate Finance-Americas and U.S. Public Finance, Moody's Corporation.

[4] Committee staff interviewed Lawrence G. Whalley, former President and Chief Operating Officer of Enron (though Mr. Whalley is no longer with Enron).

[5] Committee staff interviewed the Honorable Peter Fisher, Treasury Department Under Secretary for Domestic Finance.

[6] Committee staff interviewed William McDonough, President of the Federal Reserve Bank of New York.

[7] *See, e.g.,* Robin Sidel, Kara Scannell, and Rebecca Smith, "Enron Seeks Cash Infusion of $2 Billion," *Wall Street Journal,* November 6, 2001.

[8] John Emshwiller, Rebecca Smith, and Jonathan Sapsford, "Enron Taps $3 Billion From Bank Lines In Pre-Emptive Move to Ensure Liquidity," *Wall Street Journal,* October 26, 2001.

[9] "Moody's Downgrades Enron Corp. Long-Term Debt Ratings (Senior Unsecured to Baa2) and Keeps Them Under Review For Downgrade," Moody's Press Release, October 29, 2001; "Enron Corp."s Rating Lowered, Placed on CreditWatch Negative," S&P Press Release, November 1, 2001; "Fitch Downgrades Enron to "BBB-"; Maintains Rtg Watch Negative," *Business Wire,* November 5, 2001.

[10] Staff Interview with Lawrence G. "Greg" Whalley, former President and Chief Operating Officer, Enron Corp., October 29, 2002 ("Whalley Interview").

[11] *Id.*

Moody's Threatened Downgrade

During this period, Enron was negotiating a possible merger with Dynegy, Inc., another Houston energy company. On or about November 5 or 6, 2001, Enron officials held a confidential meeting with Moody's to detail the terms of the proposed merger agreement, which was not yet public.[12] Enron was planning to announce the proposed merger on November 8, 2001.[13] Jeffrey MacMahon, Enron's Chief Financial Officer, and Rob Doty, Dynegy's Chief Financial Officer, along with other Enron personnel, made the presentation to Moody's in a meeting that lasted approximately two to three hours.[14] Officials from Moody's who attended the meeting included Debra Perry, Senior Managing Director for Corporate Finance; Pamela Stumpp, Chief Credit Officer for Corporate Finance; Susan Abbott, Managing Director for Corporate Finance; John Diaz, Managing Director for the Power and Energy Group; and Stephen Moore, primary analyst on the Enron credit.[15]

In her interview with Committee staff, Debra Perry stated that she left the meeting believing that the business combination of Dynegy and Enron could have been "engineered" in such a fashion that the new entity could maintain a "marginal" investment grade rating. Moody's officials were concerned, however, that the merger agreement presented to them contained too many "outs" for Dynegy, principally in the form of conditions linked to "material adverse changes" ("MACs"). These MAC clauses would have allowed Dynegy to terminate the transaction based upon, among other things, a decline in Enron's credit rating.[16] Moody's officials were concerned that neither Dynegy nor the banks were sufficiently committed to the transaction, and they felt that Enron could not sustain an investment grade rating without merging with Dynegy. As a result, on the evening of November 7, 2001, Moody's convened a credit committee meeting, at which it was decided that Moody's would lower Enron's credit rating to below investment grade.[17] Moody's analyst Stephen Moore called Enron's MacMahon the next day, November 8, 2001, at approximately 8 a.m. Eastern Standard Time, to inform him that Moody's was planning to issue a press release that day announcing the downgrade.[18]

The Response to Moody's Threatened Downgrade

Enron had intended to announce its merger with Dynegy on November 8, 2001. Knowing that a downgrade in Enron's credit rating to below investment grade would end the transaction, however, Enron decided to delay the announcement after Moore informed

[12] Staff Interview with Debra Perry, Senior Managing Director for Corporate Finance-Americas and U.S. Public Finance, Moody's Corporation, October 30, 2002 ("Perry Interview").
[13] Whalley Interview, at note 10 above.
[14] Perry Interview, at note 12 above.
[15] *Id.*
[16] *Id.* A "material adverse change" clause is a term in an agreement that gives certain or additional rights (*e.g.*, such as the right to terminate) to a party to that agreement if a specific event or events occur. In the case of Enron, the material adverse change clauses related to Enron's credit rating.
[17] Perry Interview, at note 12 above. *See also* Staff Interview with Moody's officials, including John Diaz and Stephen Moore, March 8, 2002, described in Financial Oversight of Enron: The SEC and Private-Sector Watchdogs, Report Prepared by the Staff of Senate Governmental Affairs Committee, S. Prt. 107–75, 107th Cong. (October 7, 2002) at 84, n. 404. ("March 8, 2002 Moody's Interview.")
[18] Perry Interview, at note 12 above.

MacMahon of Moody's intended ratings action.[19] Soon after MacMahon received the call from Moore, MacMahon called Perry. He asked when Moody's planned to issue its press release announcing the downgrade, and told her that there was a material development of which Moody's probably was unaware—that Enron might be receiving up to $1 billion in additional equity—which he thought might affect a ratings decision.[20] Perry told MacMahon that Enron could appeal Moody's decision to lower Enron's rating, but it had to supply Moody's with new and truly significant information, and it had to do so immediately. MacMahon agreed, and Perry agreed to halt the release pending the new information from Enron.[21]

Soon thereafter, at or about 8:30 to 8:45 a.m., Perry received a call from James B. Lee, Vice Chairman of J.P. Morgan Chase, and William Harrison, Chairman and Chief Executive Officer of J.P. Morgan Chase.[22] Harrison and Lee told Perry that they were working with Enron to address Moody's concerns and requested a meeting with Moody's. Perry agreed, but said such a meeting had to take place right away. Not having heard further from J.P. Morgan Chase by 11 a.m., Perry called Lee, who offered a meeting at 1 p.m. that day at the bank's offices.[23] Perry told Committee staff that she had never been contacted by such high-level bank officials with respect to the rating of another entity.[24]

At some point before the meeting at J.P. Morgan Chase, Perry also received a call from the Chief Executive Officer and Vice Chairman of ChevronTexaco, which owned just over one-quarter of Dynegy.[25] Under the terms of the merger agreement, ChevronTexaco was to provide Dynegy with $1.5 billion to invest in Enron at the outset, and then ChevronTexaco would infuse the combined entity with another $1 billion after the closing of the transaction.[26] According to Perry, while ChevronTexaco executives expressed strong "soft" support for the transaction, they stopped short of saying that ChevronTexaco would provide any additional financial support beyond its then current involvement.[27]

Meanwhile, John Rutherfurd, the Chief Executive Officer of Moody's, also was receiving calls relating to Enron on November 8, 2001. Sometime after 9 a.m., while on his way in to work in a taxicab, Rutherfurd received a call on his cellphone. Rutherfurd told Committee staff that the person patching him into the call said the call was from Robert Rubin, former Treasury Secretary and current Citigroup executive, and Michael Carpenter, Chief Executive Offi-

---

[19] Whalley Interview, at note 10 above.

[20] Perry Interview, at note 12 above.

[21] *Id.*

[22] *Id.* Neither Harrison nor Lee were interviewed by Committee staff for this report, but counsel for J.P. Morgan Chase has confirmed the facts described in this report involving J.P. Morgan Chase officials.

[23] Perry Interview, at note 12 above.

[24] *Id.*

[25] *Id.* No one from ChevronTexaco was interviewed by Committee staff for this report.

[26] Laura Goldberg, "Dynegy to Acquire Enron in $8.9 Billion Stock Deal; New Giant Moves Out of Shadow," *Houston Chronicle,* November 10, 2001.

[27] Perry Interview, at note 12 above. Around this time, there was speculation in the press that Dynegy or ChevronTexaco might be willing to put additional capital into Enron, specifically to avoid a downgrade that would threaten the viability of the merger. *See, e.g.,* Richard A. Oppel, Jr. and Andrew Ross Sorkin, "Enron Admits to Overstating Profits by About $600 Million," *The New York Times,* November 9, 2001.

cer of Citigroup Corporate and Investment Banking.[28] As the call was going through, however, Rutherfurd recalled that he was told that Rubin was unavailable and would not be on the line.[29] Accordingly, Rutherfurd spoke only with Carpenter.[30]

Carpenter told Committee staff that until the Fall of 2001, he had not had much contact or involvement with Enron beyond the occasional senior management courtesy calls.[31] After Enron's problems started to emerge, however, his involvement increased. Although he could not recall attending any meetings with Enron directly, he was essentially the final decisionmaker relating to the additional $600 million in financing to be secured by Enron's subsidiaries' pipelines, which was announced on November 1, 2001.[32] Citigroup also was serving as an adviser to Enron with respect to the proposed Dynegy merger. Accordingly, when he was notified on November 8, 2001 about Moody's intent to downgrade Enron's credit rating, Carpenter was directly familiar with Enron's situation. Carpenter not only felt that a lowering of Enron's rating would imperil the merger with Dynegy and seriously threaten Enron's financial situation (although Carpenter said that he did not believe it would send Enron into bankruptcy immediately), but he also was concerned that any threat to the stability of Enron—a leading participant in the energy markets—would seriously disrupt those markets.[33] Carpenter wanted to communicate to Moody's that the decision it was about to make was therefore "critical," and Moody's should "make sure" it was making the right decision.

In his call to Rutherfurd, Carpenter communicated these concerns.[34] Rutherfurd told Carpenter that he did not handle ratings issues, but would pass Carpenter's concerns along to Debra Perry.[35] Rutherfurd also recalled telling Carpenter that Rutherfurd did not believe that Carpenter's concerns about Enron's potential effect on the energy markets was a consideration for Moody's, but rather an issue for the appropriate government agency to address; Rutherfurd remembered telling Carpenter that if the government had concerns about this, it could organize a "rescue" as it had for Long Term Capital Management.[36]

After arriving at his office that morning, Rutherfurd spoke to Perry, who told him about the meeting with J.P. Morgan Chase. Rutherfurd asked if Carpenter also could attend the meeting, and

---

[28] Staff Interview with John Rutherfurd, Chief Executive Officer, Moody's Corporation, October 30, 2002 ("Rutherfurd Interview").

[29] *Id.* Although a Citigroup spokesperson has acknowledged that Rubin was supposed to be on this call, *see* Jonathan Weisman, "Returning Fire, Republicans Take Aim at Rubin," Washington Post, August 4, 2002, in interviews with Committee staff, neither Rubin nor Carpenter could recall Rubin's involvement with this call in any way. Staff Interview with Michael Carpenter, former Chief Executive Officer, Citigroup Corporate and Investment Banking, November 13, 2002 ("Carpenter Interview"); Staff Interview with the Honorable Robert Rubin, Chairman of the Executive Committee and Member of the Office of Chairman, Citigroup, December 3, 2002 ("Rubin Interview").

[30] Rutherfurd Interview, at note 28 above.

[31] Carpenter Interview, at note 29 above.

[32] *Id.* Carpenter said that he had final decisionmaking authority with respect to this financing, although he consulted with Sanford Weill, and to a lesser extent, Robert Rubin, on the extension of this credit to Enron.

[33] Carpenter Interview, at note 29 above. Carpenter told Committee staff that his conclusions about the effect of instability at Enron on the energy markets was not derived from a technical analysis or expert opinion; he indicated that his conclusion was just "common sense."

[34] Rutherfurd Interview, at note 28 above; Carpenter Interview, at note 29 above.

[35] *Id.*

[36] Rutherfurd Interview, at note 28 above.

Rutherfurd recalled Perry saying that this would not be a problem.[37] According to Rutherfurd, he then called Carpenter back and invited him to the J.P. Morgan Chase meeting, which Carpenter agreed to attend.[38]

The 1 p.m. meeting lasted approximately three hours,[39] with representatives from Moody's, J.P. Morgan Chase, and Citigroup in attendance; no one from Enron was present at the meeting.[40] Perry told Committee staff that she had never attended a meeting such as this relating to a rating, when the company being rated was not represented, but the company's banks were.[41] Perry told Committee staff that prior to the start of the meeting, J.P. Morgan Chase's Harrison and Lee took her aside.[42] She recounted that Harrison warned about the systemic risk from an Enron collapse—disruption in the energy and financial markets—and said that he had spoken to William McDonough, President of the Federal Reserve Bank of New York, about the situation.[43] Perry recalled that she told Harrison that systemic risk issues were the government's problem, and if McDonough or any other government official had concerns, they could contact Moody's.[44]

According to Carpenter, Moody's had a very long list of questions for the banks, and wanted reassurance that Dynegy would close on the transaction and that the banks were truly backing the merger.[45] Perry said that she explained Moody's concerns about the fragility of the merger due to the MAC clauses that allowed Dynegy to terminate the transaction. She indicated that Moody's was also concerned that the litigation thresholds in the merger agreement were too low.[46] Perry told Committee staff that in response, J.P. Morgan Chase indicated that it would contribute an additional $250 million of capital into Enron, and Carpenter said he would consider a similar cash infusion if commercially reasonable for Citigroup.[47] Soon after this meeting, Stumpp had a conference call

---

[37] *Id.*

[38] *Id.* Carpenter did not remember speaking to Rutherfurd again, but he did recall being invited to the meeting. Carpenter Interview, at note 29 above.

[39] Perry Interview, at note 12 above; Carpenter Interview, at note 29 above.

[40] *Id.* According to Moody's, the following people attended the 1 p.m. meeting. From Moody's, the attendees were Debra Perry, Pamela Stumpp, Stephen Moore, John Diaz (by phone from Houston), and Mara Hilderman, a managing director at Moody's, who also attended by phone. From J.P. Morgan Chase, the attendees were William Harrison, James Lee, Henry Higbie, James Ballentine, Patricia Caffrey, Christopher Wardell, and James Biello. From Citigroup, Michael Carpenter and Chad Leat attended. Perry Interview, at note 12 above.

[41] Perry Interview, at note 12 above. Enron appears to have had little, if any, involvement in these talks; Whalley described Enron as a "bystander," with the banks having taken over the situation with Moody's. Whalley Interview, at note 10 above. Perry said that banks frequently provide credit rating advisory services to companies, and sometimes participate in calls and meetings with rating agencies in that regard. Perry added, however, that high-level bank executives were never involved in these arrangements. In any event, Citigroup and J.P. Morgan Chase were not, to her understanding, talking to Moody's in this instance because they were providing credit rating advisory services. Perry Interview.

[42] Perry Interview, at note 12 above.

[43] *Id.*

[44] *Id.*

[45] Carpenter Interview, at note 29 above.

[46] Perry Interview, at note 12 above.

[47] Perry Interview, at note 12 above; Carpenter Interview, at note 29 above. Carpenter indicated that Citigroup had not given any consideration to making this infusion prior to his appearance at J.P. Morgan Chase that day. He told Committee staff that when he first arrived at their offices, Lee and Harrison took him aside, told him of their intention to provide the additional capital, and asked if Citigroup would do the same. Carpenter stated that this was "out of the blue," and without clear assurances about what Enron asset would support this financing, he could not agree to the funding; he told them, however, that Citigroup would be open to contributing more capital. Carpenter Interview.

with Dynegy officials in which they agreed to remove the MAC clauses that concerned Moody's and to raise the litigation thresholds in the agreement.[48] Indeed, Perry told Committee staff that Dynegy made every change to address Moody's concerns and seemed strongly supportive of a transaction taking place.[49]

Moody's convened a credit committee meeting that evening to reconsider Enron's rating based on the new information.[50] The committee felt that the changes agreed to by the banks and Dynegy—the removal of the MAC clauses, the raising of the litigation thresholds, and the additional capital—represented a sufficient commitment to the merger, and therefore a downgrade below investment grade was not warranted at that time.[51] On November 9, 2001, Moody's announced that it was lowering Enron's rating to Baa3, the lowest investment grade rating.[52]

Despite Perry's recollection of Harrison's mention of his conversation with McDonough, Moody's representatives report that the rating agency never received any calls from government officials relating to Enron.[53] The two other major credit rating agencies—Standard & Poor's and Fitch Ratings—likewise have testified that they never received any such calls.[54]

Calls to Government Officials Regarding Enron's Credit Rating

While the bankers were talking to Moody's, they were also reaching out to government officials about Enron. Committee staff's investigation revealed calls from the bankers to two government officials: Peter Fisher, Treasury Department Under Secretary for Domestic Finance, and William McDonough, President of the Federal Reserve Bank of New York.

Robert Rubin's Call to Peter Fisher

Robert Rubin's role at Citigroup, where he started in October 1999 as Chairman of Citigroup's Executive Committee and Member of the Office of the Chairman after leaving his post as Treasury Secretary in July 1999, is at once limited and extremely broad. Rubin describes his role as "minister without portfolio," without specific duties assigned to him.[55] In other words, as Carpenter explained to Committee staff, Rubin is not "part of the operational

---

[48] Perry Interview, at note 12 above.
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] "Moody's Downgrades Enron Corp. Long-Term Debt Ratings And Keeps Them Under Review For Downgrade," Moody's Press Release, November 9, 2001. Moody's did not mention the merger in the press release because it had not officially been made public; however, Moody's was clear in interviews with Committee staff that the prospective merger with Dynegy was the only reason Enron maintained its investment grade rating at this point. Perry Interview, at note 12 above; March 8, 2002 Moody's Interview, at note 17 above.
[53] Perry Interview, at note 12 above; Rutherfurd Interview, at note 28 above; Rating the Raters: Enron and the Credit Rating Agencies, Hearing Before the Senate Governmental Affairs Committee, 107th Cong., S. Hrg. 107–471 (March 20, 2002) at 28 (Testimony of John Diaz, Managing Director, Moody's Investor Service).
[54] Rating the Raters: Enron and the Credit Rating Agencies, Hearing Before the Senate Governmental Affairs Committee, 107th Cong., S. Hrg. 107–471 (March 20, 2002) at 28 (Testimony of Ronald Barone, Managing Director, Standard & Poor's, and Ralph Pellecchia, Senior Director, Fitch Ratings).
[55] Rubin Interview, at note 29 above.

decisionmaking chain." [56] Rubin, who sits on four committees at Citigroup, said that he mainly gets involved in whatever major issues on which his counsel is requested.[57]

In the Fall of 2001, Rubin did not have an independent relationship with Enron on behalf of Citigroup. He told Committee staff that he was not aware of the level of Citigroup's exposure to Enron until Enron's troubles began that fall.[58] Rubin knew Ken Lay, having met him in or about 1992, when Rubin, then co-senior partner of Goldman Sachs, was serving as Chairman of the Host Committee for the Democratic Convention in New York while Lay was serving as Chairman of the Host Committee for the Republican Convention in Houston.[59] Others at Goldman Sachs urged Rubin to reach out to Lay in this context for business development reasons, and according to Rubin, he met with Lay once or possibly twice in this capacity.[60] Rubin recalled having a few more encounters with Lay since that time, [61] but Rubin could not recall any other direct interactions with Enron officials.[62]

Rubin's involvement on matters relating to Enron began in the Fall of 2001. He recalled attending two or possibly three meetings about Enron, primarily concerning the $600 million in financing Citigroup provided to Enron's pipeline subsidiaries on November 1, 2001.[63] In addition, in addressing Enron's difficulties in the Fall of 2001, Carpenter told Committee staff that he occasionally consulted with Citigroup Chairman and Chief Executive Officer Sanford Weill, and, to a lesser extent, Robert Rubin.[64] It was Carpenter who sought Rubin's involvement in Enron's credit rating difficulties on November 8, 2001.[65]

---

[56] Carpenter Interview, at note 29 above.

[57] Rubin Interview, at note 29 above.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.* Rubin told Committee staff that in addition to running into Lay at a conference in Shanghai and a few other chance meetings, Rubin also received two requests from Lay to serve on Enron's board of directors, both of which he refused. The first time was in 1999, either just before or shortly after Rubin left Treasury. Rubin indicated that the request, which piqued his interest somewhat because of Enron's trading business and Rubin's own background as a trader, was one of 30 or 40 he received at the time, but he never seriously considered it, as Rubin was interested in a board position with a major industrial company. Rubin said Lay also called to ask him to join Enron's board just after the company's problems emerged in the Fall of 2001, to help the company through the crisis. Rubin refused that request as well. The only other contact with Lay that Rubin could recall was a call from Lay in 1999, in which he asked Rubin to meet with Lay's son Mark regarding Mark Lay's for-profit inner city investment organization, in an apparent hope that Rubin would join the board. (Rubin serves as Chairman of the board of a non-profit community development organization, so it is an area of interest for him.) Rubin refused. Rubin Interview. In addition to Rubin's recollections, records reviewed by Committee staff in connection with its Enron investigation indicate that two additional contacts between Rubin and Lay may have taken place. Documents reflect that a meeting between Rubin and Lay was scheduled for July 27, 1994, while Rubin was serving as Assistant to the President for Economic Policy and head of the National Economic Council. Documents also show that Rubin and Lay both may have attended a meeting scheduled for August 4, 1997 with the President and a group of business leaders.

[62] Rubin has maintained a friendship with Linda Robertson, who was the head of Enron's government affairs office in Washington during the time period relevant here, but Rubin said that he and Robertson did not speak of Enron business. Rubin Interview.

[63] Rubin Interview, at note 29 above.

[64] Carpenter Interview, at note 29 above. Rubin did not specifically recall this. Rubin Interview, at note 29 above.

[65] Carpenter Interview, at note 29 above. Rubin told Committee staff that he recalled that someone from Salomon Smith Barney asked him to make the call to Treasury, but he could not independently recall who it was; when his counsel refreshed Rubin's recollection by telling him that Carpenter recalled making the request, Rubin thought that seemed correct. Rubin Interview, at note 29 above.

Carpenter remembered calling Rubin sometime on the morning of November 8, 2001 to tell him about Moody's intention to lower Enron's rating to below investment grade.[66] Rubin recalled being told that the concern was that a downgrade effectively would end the possibility of the planned merger with Dynegy, which was supposed to stave off an Enron bankruptcy. Indeed, Rubin understood that the downgrade itself probably would precipitate a bankruptcy, since Enron was a trading company and counterparties would not trade with a below-investment grade entity.[67] Carpenter also remembered sharing his concerns with Rubin about the damaging implications for the energy markets, financial markets, and possibly even the banking system if the company's stability was endangered.[68] According to Carpenter, he told Rubin that Citigroup should alert the relevant regulators to the problem. To Carpenter, this meant the Treasury Department and the Federal Reserve Bank should be called.[69] Carpenter said he would call the Federal Reserve, but asked Rubin to call Treasury, as Carpenter did not have any contacts there, and Rubin agreed to make the call.[70] Carpenter called Rubin again before the 1 p.m. meeting at J.P. Morgan Chase, but could not recall if he got through to Rubin, or if he did, whether he told Rubin about the 1 p.m. meeting with Moody's.[71]

On November 8, 2001, Rubin called Peter Fisher at approximately 2:30 p.m.[72] Peter Fisher has known Rubin since approximately 1993, when Fisher was at the Federal Reserve Bank of New York with responsibility for matters relating to foreign currency and central banks and Rubin was Secretary of the Treasury. Fisher recounted that he and Rubin participated in frequent telephone calls during Rubin's tenure as Treasury Secretary about emerging issues in these areas.[73] According to Fisher, he and Rubin have had only occasional and, for the most part, casual contact since Rubin's departure from the Treasury Department.[74]

Fisher, however, had just spoken to Rubin a little over a week before the November 8, 2001 call. Fisher called Rubin on October 31, 2001 to alert Rubin to the announcement by the Treasury Department that morning that it was halting the issuance of the thirty-year bond.[75] As Fisher was monitoring Enron's situation at the time,[76] Fisher, aware that Citigroup was one of the banks with the

---

[66] Carpenter Interview, at note 29 above.
[67] Rubin Interview, at note 29 above.
[68] Carpenter Interview, at note 29 above.
[69] *Id.*
[70] *Id.* Rubin did not recall knowing or having been told that Carpenter was planning to call or had called William McDonough. Rubin Interview.
[71] Carpenter Interview, at note 29 above. Rubin did not remember this call.
[72] Memorandum from Peter Fisher to David Aufhauser, General Counsel, Treasury Department, November 8, 2001 ("Fisher Memo," attached as Appendix A).
[73] Staff Interview with Peter Fisher, Under Secretary for Domestic Finance, U.S. Department of the Treasury, October 28, 2002, November 19, 2002 ("Fisher Interview").
[74] *Id.*
[75] *Id.* Rubin remembered that Fisher had called him about this, but did not recall when. Rubin Interview, at note 29 above.
[76] During this time, Fisher, at the request of Tim Adams, Chief of Staff to Treasury Secretary Paul O'Neill, had a number of conversations with L. Greg Whalley, then Enron's President, about Enron's financial health and position in the markets. Fisher Interview, at note 73 above; Whalley Interview, at note 10 above. Fisher's marching orders, as he understood them, were to obtain a clear picture of Enron's financial situation from Whalley and form a view about whether there was any role for Treasury to play. Fisher Interview. Fisher and Whalley had about eight conversations during late October into November. Fisher Interview; Whalley Interview. Throughout this period, Fisher also spoke to a number of people on Wall Street and in

Continued

most exposure to and involvement with Enron, recalled asking Rubin about Citigroup's comfort level with respect to that company's fortunes. Fisher said that Rubin was "reasonably sanguine" about Enron's situation at that point, indicating to Fisher that Citigroup was in a "dialogue" with Enron, which Fisher interpreted as a positive sign.[77]

The next time Fisher and Rubin spoke was on November 8, 2001. Fisher returned Rubin's call shortly after he received it.[78] Their recollections of the call are similar, although they both told Committee staff they have not discussed it since speaking that day.[79] According to Rubin, he prefaced the call with a disclaimer that the suggestion he was about to make was "probably a bad idea."[80] Rubin said that he mentioned the potential detrimental effect an Enron bankruptcy could have on the energy markets.[81] Rubin then told Fisher that Enron's banks were considering infusing additional capital into Enron, but that a risk of a credit rating downgrade had emerged that would prevent this and might precipitate instability at the company that would wreak havoc in the markets.[82] Rubin said that he then asked Fisher what he thought of this idea: that Fisher might call the rating agencies and ask them to delay action while the banks decided about the additional capital.[83] Fisher refused, and Rubin replied that he thought that was probably the right decision.[84]

Fisher's recollection of the call, which he thought lasted approximately four minutes, was that Rubin told him of the potential downgrade.[85] Then, after Rubin offered the disclaimer that his suggestion was probably a "bad idea," Fisher recalled that Rubin asked what Fisher would think of contacting the rating agencies to encourage them first to specify what would be needed to prevent a downgrade, rather than simply going forward with the ratings action.[86] Fisher said he told Rubin he thought that was a bad idea.[87] According to Fisher, Rubin had indicated that there was a "nonpublic equity investor" involved, and Fisher told Rubin that the investor was better suited to make contact with the rating agen-

---

the business community to gauge their views of the situation. Based on these conversations and his conversations with Whalley, Fisher formed a view that Enron's collapse, if it were to occur, would not have a systemic effect on the markets, and that the market had "priced in" Enron's problems into its stock price. Therefore, Fisher concluded that no action from Treasury was necessary. Fisher Interview.

[77] Fisher Interview, at note 73 above; Rubin did not recall that he and Fisher spoke about Enron in that conversation. Rubin Interview, at note 29 above. Fisher was most interested in whether the two sides were keeping an open line of communication. Fisher said that he called Rubin again a few days later to get more information and an update regarding Citigroup's comfort level with respect to Enron, but Rubin was not available and Fisher was transferred to another person at Citigroup (Fisher could not remember whom); although they had a fairly long conversation, Fisher did not learn anything significant, except that Citigroup and Enron were continuing their dialogue. Fisher Interview. Rubin did not remember or was not aware of this call from Fisher. Rubin Interview.

[78] Fisher Memo, at note 72 above.

[79] Fisher Interview, at note 73 above; Rubin Interview, at note 29 above.

[80] Rubin Interview, at note 29 above.

[81] *Id.* Rubin indicated that he formed this view about the potential effect of instability at Enron based on his extensive experience with respect to the workings of markets, and his understanding that Enron was a major market maker in energy. He acknowledged, however, that this was just his view and was not based on any other expert's opinion or analysis. Rubin Interview.

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] Fisher Interview, at note 73 above.

[86] *Id.*

[87] *Id.*

cies.[88] Fisher did not know who this investor was, but did not think it was Dynegy, whose involvement with Enron at that point was well-known, although the merger had not been officially announced.[89]

Fisher prepared a contemporaneous memorandum to David Aufhauser, General Counsel of the Treasury Department, detailing the contents of the call with Rubin.[90] The memorandum is basically consistent with Fisher's recollection of the call.[91] It also indicates that Rubin mentioned that "conversations" were taking place between the unnamed investor and the rating agency that afternoon.[92] In addition, it indicates that Rubin told Fisher that "a suggestion had been made to another public sector official that he place a call to the rating agency to encourage them to work with the bankers and the investor but that the official had declined to do so."[93] Neither Rubin nor Fisher remembered this remark when asked about it, and did not know who the "public sector official" might have been.[94] Both Rubin and Fisher said they did not know or did not remember knowing that William McDonough, of the Federal Reserve Bank of New York, had received calls that day from bankers concerned about Enron's credit rating situation.[95]

Fisher stated that, after receiving the call from Rubin, he considered mentioning it to Secretary O'Neill, but dismissed the idea.[96] Nevertheless, a few days after receiving the call from Rubin, O'Neill told Fisher about Ken Lay having contacted Commerce Secretary Don Evans regarding Enron's difficulties with the credit rating agencies.[97] Fisher paraphrased O'Neill as saying, "Can you believe Ken Lay called Don Evans and asked if he would intervene with the credit rating agencies?"[98] Fisher believed that O'Neill took the call as an indication of Enron's imminent demise, and was

[88] *Id.*

[89] *Id.* When asked about the reference to this "non-public investor," which appears also in the Fisher Memo, Rubin did not have any recollection of mentioning this to Fisher, nor could he discern to whom he might have been referring if he did reference such an "investor." Rubin said that the only parties he was aware of in the transaction in addition to Enron were the banks and Dynegy. Rubin Interview, at note 29 above.

[90] Fisher Interview, at note 73 above; Fisher Memo, at note 72 above. Fisher said it was unusual for him to prepare such a memo. He said that he has only drafted memos like this one three times before, and could not recall doing so after a telephone call. Fisher described the call as "extraordinary," and "worthy of note," but he indicated that he did not view the call as inappropriate. He could not say why he was prompted in this situation to write the memo.

[91] Fisher told Committee staff that he had not reviewed the Fisher Memo in advance of the Committee staff interview to refresh his recollection. Fisher Interview, at note 73 above.

[92] Fisher Memo, at note 72 above. This does not shed light on who the "investor" could have been, as both the banks and Dynegy had "conversations" with Moody's that afternoon.

[93] *Id.*

[94] Fisher Interview, at note 73 above; Rubin Interview, at note 29 above.

[95] *Id.* Fisher indicated he was aware that McDonough had received a call relating to Enron from Richard Grasso, Chairman and Chief Executive Officer of the New York Stock Exchange. Fisher told Committee staff that he spoke to McDonough frequently, and this came up in conversation in late October or early November of 2001. Fisher Interview.

[96] Fisher Interview, at note 73 above.

[97] *Id.* According to Secretary Evans, Lay's call had come on October 29, 2001, and had gone as follows: "[Lay] called me to let me know that Moody's was undergoing a review of their credit rating, and he also wanted to remind me and did remind me, which I knew, the large player they are in the energy markets, which obviously I was aware of, and said to me he didn't know if there was any support that we could give them at Moody's, but if there was, he would welcome that, but left it up to my judgment. I listened to him and told him, 'Thank you very much.'" "Don Evans Discusses The Collapse of Enron," *Meet The Press, NBC News Transcripts,* January 13, 2002. No evidence has emerged to indicate that Secretary Evans took any action on behalf of Enron with the credit rating agencies.

[98] Fisher Interview, at note 73 above.

surprised it was coming so quickly. In response to O'Neill's recounting of Lay's call to Evans, Fisher told O'Neill about Rubin's call.[99]

Fisher told Committee staff that he did not believe it "useful" for government officials to contact rating agencies about particular ratings, because such a call would serve only to distract the rating agencies from their task.[100] Nevertheless, he said that Rubin's call did not make him uncomfortable, because they were each free to take action as they believed would best serve their own respective interests. Fisher explained that he and Rubin were equals, and thus Fisher had the option of simply saying no to Rubin, as he had done.[101]

Rubin told Committee staff that he thought his call to Fisher was "not only proper, but I would do it again." Rubin said that the potential impact on the energy markets posed by Enron's possible collapse at the time was a public policy issue that warranted Treasury's attention.[102] Although Rubin acknowledged that even at the time he felt that it may have been a bad idea for Treasury to get involved, it was still worth calling the Department's attention to the matter.[103] As to whether a government official should ever intervene in a ratings action, Rubin said that the issue had never come up while he served as Treasury Secretary, and he had not given the matter a great deal of thought.[104]

Calls to William McDonough

William McDonough, President of the Federal Reserve Bank of New York, received a number of calls on November 8, 2001 relating to Enron.[105] The first such call, which in retrospect, McDonough speculated was probably a warning about the calls to come, was from Richard Grasso, Chief Executive Officer of the New York Stock Exchange, at 9:38 a.m.[106] McDonough indicated that he and Grasso speak frequently, but it was unusual to receive a call from Grasso after the opening of the stock market at 9:30 a.m.[107] McDonough's recollection of the call was that Grasso called him about the fact that Enron might be subject to a rating agency downgrade, which could have placed in jeopardy the proposed merger with Dynegy.[108] According to McDonough, Grasso and McDonough agreed that both should stay out of ratings issues, so as not to influence ratings in any way.[109]

After the call from Grasso, McDonough got a call from J.P. Morgan Chase's Harrison at 9:47 a.m. and a call from Citigroup's Car-

---

[99] *Id.*
[100] *Id.*
[101] *Id.* Fisher told Committee staff that he might not have felt the same way if such a call had been made to a lower-level staffer at the Treasury Department, who might have felt "pressured" to take some action.
[102] Rubin Interview, at note 29 above.
[103] *Id.*
[104] *Id.*
[105] Staff Interview with William McDonough, President, Federal Reserve Bank of New York, November 26, 2002 ("McDonough Interview").
[106] *Id.* McDonough did not independently recall the times of this and other calls; he refreshed his recollection with his telephone log. Richard Grasso was not interviewed by Committee staff for this report, but representatives from the New York Stock Exchange have indicated that they stand by McDonough's description of this call.
[107] *Id.*
[108] *Id.*
[109] *Id.*

penter at 10:08 a.m.[110] McDonough could not remember the details of these calls, except he thought that the credit rating problem came up and they discussed the effect a downgrade of Enron to below investment grade might have on the merger with Dynegy.[111] McDonough did not remember whether Harrison or Carpenter raised the credit ratings issue, or if McDonough, having been alerted to the problem by Grasso, preemptively said that the Federal Reserve Bank would not get involved with credit ratings as a matter of policy.[112] Either way, McDonough said that he did not recall being asked directly to intervene with the credit rating agencies, but would have refused had he been asked.[113]

Carpenter's recollection of his call with McDonough was more specific. He said that he told McDonough that Moody's was considering downgrading Enron and would make a decision within the next day.[114] According to Carpenter, he told McDonough about his belief that this could have a serious impact on the energy markets, the financial markets, and even on the banking system.[115] Carpenter could not recall, however, if he asked McDonough to call Moody's.[116] Carpenter indicated that McDonough was fairly unresponsive to his call, basically saying only, "Thank you for the call."[117]

McDonough told Committee staff that the Federal Reserve Bank has a longstanding, though unwritten, policy not to intervene with credit ratings, which he believes should have been well-known to the bankers who contacted him.[118] McDonough said that the policy is intended to prevent the Federal Reserve Bank from even unintentionally influencing the process of ratings, which might distort the markets.[119] McDonough stated, however, that banks are encouraged to contact the Federal Reserve Bank as early as possible about any problems in the market—particularly those involving entities to which regulated banks have significant exposure—to alert the Federal Reserve quickly to issues that might arise.[120]

CONCLUSIONS

Influence or Pressure on Moody's

In a report released in October 2002, Committee staff expressed the view that Moody's and the other credit rating agencies should have downgraded Enron to below investment grade much earlier than they did (November 28, 2001)—indeed, significantly earlier than November 8, 2001.[121] In that report, Committee staff attributed this lapse to the rating agencies' failures to probe more deeply to get the information they needed to assess Enron, and to focus

[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] Carpenter Interview, at note 29 above.
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] McDonough Interview, at note 105 above.
[119] *Id.*
[120] *Id.*
[121] *See* Financial Oversight of Enron: The SEC and Private-Sector Watchdogs, Report Prepared by the Staff of Senate Governmental Affairs Committee, S. Prt. 107–75, 107th Cong. (October 7, 2002), at 89–90.

on issues affecting long-term health of the company, rather than only short-term considerations.[122] Accordingly, putting aside the question whether Moody's should have lowered Enron's rating to below investment grade before November 28, 2001, it nevertheless does not appear from Committee staff's investigation that Moody's decision not to do so on November 8, 2001 came as the result of any inappropriate influence or pressure from any private-sector or government official.[123]

Based on interviews conducted by Committee staff in this investigation and Moody's own testimony before the Committee in March 2002, Committee staff concludes that Moody's never received any calls from any government officials, and thus no pressure was brought to bear from the public sector. As for the private sector, Moody's did have significant contact, mostly with Enron's bankers—J.P. Morgan Chase and Citigroup—and Dynegy on November 8, 2001. According to those involved, Moody's only agreed to forgo lowering Enron's rating to junk after Dynegy agreed to address Moody's specific concerns associated with the merger agreement, and after J.P. Morgan Chase committed to providing additional capital to Enron, and Citigroup agreed to consider doing so. To Moody's, a successful Enron-Dynegy merger was the only justification for Enron's investment grade rating; if the merger appeared unlikely to occur, that rating level was not justified for Enron. Moody's was concerned that certain merger terms (such as the MAC clauses and the litigation thresholds) indicated a lack of commitment to the merger on the part of Dynegy, making the merger less likely. When the banks and Dynegy provided substantive comfort to Moody's about their commitment—the changes to the agreements and the additional capital—Moody's once again felt justified in its rating. To the extent that the bankers tried to raise the spectre of market disruption as a result of an Enron collapse brought on by a credit rating downgrade, Moody's does not appear to have been swayed by that argument; instead, Moody's officials appear to have required substantive changes to address its concerns.

Rubin's Call to Fisher

There have been suggestions in the press and from Members of Congress that Robert Rubin's November 8, 2001 call to Peter Fisher regarding Enron's credit rating was somehow improper. Committee staff asked CRS to review the facts of Rubin's telephone call to Fisher as gleaned both from staff interviews in connection with this report and from media accounts, and to opine as to whether any laws or regulations were violated by Rubin in making such a call.[124]

---

[122] *Id.*

[123] It is relevant to note that to the extent Moody's was lobbied on Enron's credit rating, there are no statutes or regulations specifically prohibiting this. Credit rating agencies, despite the quasi-governmental function they serve by providing ratings used as benchmarks in a number of Federal and state laws and regulations, are private entities, and the credit rating process—at least presently—is not regulated. *Id.* at 79–84.

[124] This analysis focuses on Rubin's status as former Secretary of the Treasury; to the extent that he was acting in his capacity as Citigroup executive, CRS has stated that "it may be noted that persons who are now private citizens, as well as the corporations that they might represent, have been recognized to possess First Amendment rights to petition the Government and to engage in advocacy speech with the Government (even when otherwise competitors combine to

CRS, in an opinion attached to this report, reviewed the legal restrictions applicable to former cabinet-level officials regarding post-employment activities in the private sector.[125] Of those limitations that CRS' expert Jack Maskell listed in this opinion, he concluded that only two have potential relevance to the Rubin call to Fisher—the restrictions on "switching sides" and the "cooling off" requirements.[126] According to CRS' Maskell, the "switching sides" rule imposes a lifetime ban on representing a party before or against the U.S. Government in relation to a particular matter between specific parties on which the official had worked "personally and substantially" while still employed by the government.[127] The rule also imposes a two-year ban on representing a party before or against the U.S. Government regarding a particular matter over which the former government employee had "official responsibility."[128] The "cooling-off" requirements mandate that very senior executive branch officials—including cabinet officers—may not for one year after leaving the government represent parties or make contacts for advocacy purposes on any matter before the agencies or departments they left, or to any person at a certain level of the government in any agency or department of the executive branch.[129]

The CRS opinion concludes that neither of these restrictions applies to the Rubin call to Fisher. The one-year "cooling-off" period required by statute already had passed: Rubin left the Treasury Department in July 1999, and he called Fisher on November 8, 2001.[130] As to the "switching sides" ban—either the lifetime ban or the two-year ban—Enron's credit rating by Moody's was not a matter on which Rubin worked while at the Treasury Department. The two-year ban would not apply because Rubin had left the Treasury Department more than two years before the call to Fisher. As for the lifetime ban, according to CRS, the rule requires that the matter be a "particular" one between specific parties, such as a specific "investigation, application, requires for a ruling or determination, rulemaking, controversy, claim, charge, accusation, arrest, or judi-

---

lobby the Government on a matter of mutual interest to the industry)." Memorandum from Jack Maskell, Legislative Attorney, American Law Division, Congressional Research Service, to Senate Committee on Governmental Affairs, regarding Issues Concerning Post Employment, Revolving Door Laws and Former Secretary of the Treasury, December 16, 2002 ("CRS Rubin Opinion," attached as Appendix B) at 1. CRS' observation with respect to the bankers' calls to McDonough would also apply: barring any evidence of bribery or similar malfeasance, "there is no apparent violation of any Federal law for a private, regulated entity to generally communicate informally with, lobby, discuss, explore, or otherwise suggest or try to persuade officials of Federal regulatory departments, agencies, government corporations or sponsored enterprises, concerning matters of public policy, economic policy, or potential governmental action concerning or into matters in which those private entities may have financial interests." Memorandum from Jack Maskell, Legislative Attorney, American Law Division, Congressional Research Service, to Senate Committee on Governmental Affairs, regarding Propriety of Informal Communication from Private Regulated Financial Entity to the Federal Reserve Bank, December 17, 2002 ("CRS FRB Memo," attached as Appendix C).

[125] *See* CRS Rubin Opinion.

[126] *Id.* at 3.

[127] This rule is codified at 18 U.S.C. § 207(a)(1). *See* CRS Rubin Opinion at 2.

[128] *See* CRS Rubin Opinion at 2, citing 18 U.S.C. § 207(a)(2).

[129] *See* CRS Rubin Opinion at 2, citing 18 U.S.C. § 207(d). The CRS Rubin Opinion notes that President Clinton issued Executive Order No. 12834 on January 20, 1993, which, among other things, extended the "cooling-off" period for lobbying a former official's department or agency to five years and required each official in the Administration to take an oath to this effect. By a subsequent Executive Order (No. 13184) issued on December 28, 2000, President Clinton revoked Executive Order No. 12834. As Rubin's telephone call to Fisher took place in November 2001—nearly a year after this Order was rescinded—Maskell notes that it has no application here. CRS Rubin Opinion at 3–4.

[130] CRS Rubin Opinion at 4.

cial or other proceeding."[131] This does not apply because Rubin did not work "personally or substantially"—or at all, to his recollection—on a Moody's credit rating decision relating to Enron while at the Treasury Department.[132] Moreover, even if he had, CRS is skeptical that this type of "matter" is one that falls under the restriction.[133]

Therefore, based on Committee staff's investigation, it does not appear that Rubin violated any laws or regulations in contacting Fisher and proposing that the Treasury Department contact a credit rating agency in connection with Enron's rating. Moreover, the "idea" Rubin proposed in the November 8 conversation—a request from Treasury to Moody's to delay its rating decision regarding Enron—would not itself have violated any laws,[134] although neither Fisher nor McDonough of the Federal Reserve Bank of New York believed that such government intervention would be good policy in general, and even Rubin indicated that he did not at the time believe it to be a very good idea.[135]

Bankers' Calls to McDonough

Similarly, the Committee staff asked CRS to analyze whether the November 8, 2001 calls regarding Enron to William McDonough, President of the Federal Reserve Bank of New York, from William Harrison of J.P. Morgan Chase and Michael Carpenter of Citigroup, violated any law or regulation. CRS concluded that they did not, based on the accounts of these calls from the Committee staff interviews with McDonough and Carpenter.[136] Based on its investigation, Committee staff agrees that it does not appear that the calls violated any law or regulation.

Although McDonough's and Carpenter's recollections of the calls were not very specific, even assuming that Carpenter and Harrison asked McDonough to intervene with Moody's in its rating of Enron—and neither recalled whether this request was actually made—the bankers would not have been in violation of any law or rule in making this request. As CRS explains, barring any evidence of bribery or similar malfeasance, "there is no apparent violation of any Federal law for a private, regulated entity to generally communicate informally with, lobby, discuss, explore, or otherwise suggest or try to persuade officials of Federal regulatory departments, agencies, government corporations or sponsored enterprises, concerning matters of public policy, economic policy, or potential governmental action concerning or into matters in which those private

[131] CRS Rubin Opinion at 3, citing 18 U.S.C. § 207(i)(3).
[132] Rubin confirmed this through his counsel.
[133] CRS Rubin Opinion at 3.
[134] There are no statutory legal prohibitions on government officials requesting credit rating agencies to take particular actions such as the one suggested here. However, given the protections afforded ratings under the First Amendment in other contexts, see Financial Oversight of Enron: The SEC and Private-Sector Watchdogs, Report Prepared by the Staff of Senate Governmental Affairs Committee, S. Prt. 107–75, 107th Cong. (October 7, 2002), at 96–97, it might be suggested that the government was exercising unconstitutional prior restraint on speech if it sought to stop publication of a rating decision.
[135] When Fisher and McDonough were asked, however, what they would have done had they believed that Enron's collapse posed a systemic risk to the markets, as Rubin and Carpenter were suggesting—Fisher and McDonough had both determined that Enron did not pose such a risk—neither could say. Fisher Interview, at note 73 above; McDonough Interview, at note 105 above.
[136] *See* CRS FRB Memo.

entities may have financial interests."[137] In addition, CRS points out, corporations have a First Amendment right to petition the government or to advocate for action from the government.[138]

In his interview with Committee staff, McDonough indicated that he regularly speaks to J.P. Morgan Chase and Citigroup bankers, as the Federal Reserve Bank of New York is the main bank regulatory agency for those banks.[139] McDonough explained that, when problems may be on the horizon, he believes that everyone benefits if the regulators are made aware of the problems as early as possible, and banks are encouraged to so notify the Federal Reserve Bank.[140] In the case of Enron, McDonough already had concluded that an Enron collapse did not pose a systemic risk to the markets or the banking system. That, combined with the Federal Reserve Bank's unwritten policy on non-intervention with credit ratings, led McDonough to determine that he would not intervene with Moody's rating of Enron.[141] As McDonough acknowledged, however, he was unsure what he would have done had the Federal Reserve Bank determined that Enron's collapse did pose a systemic risk.[142]

---

[137] *Id.* at 1.

[138] *Id.* at 1–2, citing *Eastern Railroads President Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 137–138 (1961).

[139] McDonough Interview, at note 105 above.

[140] *Id.*

[141] *Id.*

[142] *Id.*

APPENDIX A

To: David Aufhauser
From: Peter Fisher
Date: November 8, 2001

This afternoon at 2:30 Bob Rubin called me and I returned the call shortly thereafter.

He informed me that that a non-public investor (I assume he meant one whose name was not now known to be involved) was interested in injecting equity into Enron but faced the risk of a downgrade of Enron below investment grade. While bankers had apparently suggested to the rating agency that instead of downgrading why didn't the agency suggest what steps would be necessary to prevent a downgrade.

Bob explained that the a suggestion had been made to another public sector official that he place a call to the rating agency to encourage them to work with the bankers and the investor but that the official had declined to do so. Bob wondered what I thought of my placing such a call. I told Bob that both my heart and my head told me not to place that call and that I thought the person best placed -- with the most credibility -- to make that call would be the potential equity investor. Bob said that he understood my reaction and thought it reasonable. Bob also stated that conversations -- direct or indirect -- between the rating agency and the investor were occurring this afternoon.

APPENDIX B

Memorandum

December 16, 2002

TO: Senate Committee on Governmental Affairs
Attention: Cynthia Lesser

FROM: Jack Maskell
Legislative Attorney
American law Division

SUBJECT: Issues Concerning Post Employment, Revolving Door Laws and Former Secretary of the Treasury

---

This memorandum responds to the Committee's request, as discussed with Cynthia Lesser, for a legal analysis of whether any laws or regulations were violated in the case of former Secretary of the Treasury, Robert Rubin, contacting an official of the Treasury Department in November of 2001 concerning the potential downgrading of the credit rating of Enron Corporation by a private credit-rating business.

According to information from the press, and as provided by the Committee, Mr. Rubin on November 8, 2001, then working for a private financial industry institution, Citigroup Incorporated, called the Treasury Undersecretary for Domestic Finance, Mr. Peter Fisher, to discuss the possibility, or as variously described, the option, or to sound out Mr. Fisher's thinking about the possibility of Mr. Fisher's calling the private credit ranking business Moody's, to ask them to delay action on Enron's credit rating until banks and other private institutions decided about additional capital infusion to Enron, to avert the credit downgrade of Enron, and thus to avert a potential negative effect on the nation's energy markets. According to the reports Mr. Rubin had himself expressed doubts to Mr. Fisher concerning the advisability of such a call, and Mr. Fisher had informed Mr. Rubin during that conversation that he did not intend to make such a call.

The issue of the propriety or legality of the contact made by Mr. Rubin is examined in light of federal conflict of interest restrictions on former high ranking Government officials. Aside from such post-employment conflict of interest laws applicable to former Government officials and their contacts with federal agencies, it may be noted that persons who are now private citizens, as well as the corporations that they might represent, have been recognized to possess First Amendment rights to petition the Government and to engage in advocacy

speech with the Government (even when otherwise competitors combine to lobby the Government on a matter of mutual interest to the industry).[1]

The post-employment, "revolving door" restrictions that apply to cabinet level officials, who are considered under the law to be "very senior" officials of the Government, consist of five basic limitations on post-employment, private "representational" activities:

1. *Lifetime Ban on "Switching Sides."* Cabinet officials, like all other officers and employees of the executive branch, are subject to a lifetime ban on "switching sides" on certain particular matters, that is, they are barred from ever representing a private party before or against the United States Government in relation to a "particular matter" involving "specific parties," such as a specific legal case, investigation, or contract, when the official had worked on that *same* matter involving those parties "personally and substantially" while in the employ of the Government. 18 U.S.C. § 207(a)(1). The lifetime prohibition is upon subsequent "representational" or "professional advocacy" types of activities, that is, where the former official makes "any communication or ... appearance" to or before the Government "with the intent to influence" the Government on the same matter on which the former official had personally and substantially worked for the Government while in its employ.[2]

2. *Two-Year Ban on "Switching Sides."* Cabinet officials and all other officers and employees of the executive branch are subject to the prohibition at 18 U.S.C. § 207(a)(2) which provides a two-year ban on the same types of private representational, post-employment conduct involved in the lifetime ban, except that it extends to matters which were merely under the "official responsibility" of the federal official during the last year in which the employee was with the Government. This lesser restriction does *not* require that the former federal employee have personal and substantial involvement in the matter when the individual worked for the Government.

3. *Aiding or Assisting Representations in Treaty or Trade Negotiations.* Section 207(b) of title 18 prohibits all officers and employees of the executive branch, and certain officials in the legislative branch, for one year after leaving the Government, from representing, aiding or advising anyone concerning United States trade or treaty negotiations when the former officer or employee had personally and substantially participated in ongoing negotiations on behalf of the United States within the last year of his employment, and who had access to certain non-public information.

4. *One-Year "Cooling-Off" Period on Lobbying the Executive Branch.* The restrictions of 18 U.S.C. § 207(d) apply to "very senior" officials of the executive branch, including the Vice President, officials compensated at level I of the Executive Schedule (cabinet officers and certain other high-ranking officials), and employees of the Executive Office of the President compensated at level II of the Executive Schedule. These officials may not for one year after leaving the Government make representations or advocacy contacts on *any* matter before or to their former agencies or departments, or to any person in an Executive Level position I through V in *any* department or agency of the entire executive branch.

---

[1] *Eastern Railroads President Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-138 (1961). *See*, generally, discussion in Eastman, *Lobbying: A Constitutionally Protected Right*, American Enterprise Institute for Public Policy Research (1977).

[2] *See* Office of Government Ethics Regulations, at 5 C.F.R. §§ 2637.101(c)(5), 2637.201(b).

5. *Representing Foreign Governments.* Section 207(f) bars, for a year after leaving the Government, all "senior" or "very senior" employees of the executive branch (including cabinet officials), from performing certain representational or advocacy activities for or on behalf of a foreign government or foreign political party before the United States Government. This provision prohibits, for one year after leaving the Government, those covered former officials from representing an official foreign entity "before any officer or employee of any department or agency of the United States" with intent to influence such United States official in his or her official duties, and prohibits a former senior or very senior official from aiding or advising a foreign entity "with the intent to influence a decision of any officer or employee of any department or agency of the United States."

Clinton Administration Appointees. In addition to the statutory restrictions and limitations, senior appointees in the executive branch in the Clinton Administration were required under Executive Order to take an "ethics pledge," which had extended some of the time limitations of the statutory restrictions to five years, and which had added certain other limitations.[3] The officials to whom these added restrictions applied included cabinet appointees. The provision of the order of potential relevance had limited those covered officials from lobbying any officer or employee of the former officials' agencies for five years after leaving the Government. That Executive Order was, however, revoked and withdrawn in the last days of the Clinton Administration (on December 28, 2000),[4] and President Bush has never re-instituted the additional ethical limitations on his or his predecessor's appointees.

Of the applicable restrictions, there would appear to be only two provisions of the post-employment laws that might have even a potential relevance to the activities of Mr. Rubin, that is, the restrictions on "switching sides" and the so-called "cooling off" requirements. It does not appear from the information available, however, that the call from Mr. Rubin to the current Undersecretary of the Treasury on November 8, 2001, violated either of these potentially applicable post-employment, revolving door laws.

The "lifetime ban" on "switching sides" in 18 U.S.C. § 207(a), is a fairly narrow and case specific restriction requiring that one who worked on a particular governmental matter such as a specific contract, a particular investigation, or a certain legal action involving specifically identified private parties, not "switch sides" to then represent that private party before the Government on that same, specific matter. There is no indication, in the first instance, that the Treasury Department during Mr. Rubin's tenure was concerned during that time with Enron's credit rating by Moody's, and secondly, if such matter did specifically come before the Treasury Department during that time, there is no indication from the materials provided that Mr. Rubin had worked on any such matter personally and substantially while with the Treasury Department.[5] Finally, it is not apparent that such a matter, involving Treasury Department policy of discussing with an outside, private credit business the possibility of conferring or consulting with banking interests and other private

---

[3] Executive Order No. 12834, January 20, 1993.

[4] Executive Order No.13184, December 28, 2000.

[5] The two-year ban on these type of matters involving specific parties which had been under the "official authority" of a Government official, would not be relevant, in any event, since Mr. Rubin departed the Treasury Department on July 2, 1999, and a call to the Treasury Department on November 8, 2001, would be beyond two years. *See* dates of service of Secretary Rubin in official Treasury Department biography, www.ustreas.gov/education/history/secretaries/rerubin.html.

investors about the possible infusion of capital to a private business, with an eye to effectuating a delay in a credit rating downgrade, was the type of particular governmental matter involving specific parties, as required by this part of the statute. The "switching sides" provision applies, in the words of the statute, to a "particular matter" such as an "investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest or judicial or other proceeding ...,"[6] and then only when such "particular matter" involves specific parties. The regulations of the Office of Government Ethics note that: "Such a matter typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identifiable parties."[7]

As to the cooling off periods, it has been noted that although President Clinton had by Executive Order required a 5 year "cooling off" period from his high-level appointees, such an extended restriction was revoked by Executive Order in December of 2000, before the subject call of Mr. Rubin, and no such extended restriction has been re-instituted by statute or Executive Order. The other operative "cooling off" period for those who were very high-level executive branch officials, is a one year "no contact" period on an official matter before the agency. The contact made by Mr. Rubin, even if the one year cooling off period arguably covered such a matter involved (that is, that it was a matter before the agency "on which such person seeks official action"), and even if the restriction covered the nature of the communication made by Mr. Rubin (a communication "with the intent to influence"), involved a communication which was made in November of 2001, more than two years after Mr. Rubin's departure from the Department of Treasury,[8] and thus was clearly outside of the one-year statutory restriction.

---

[6] 18 U.S.C. § 207(i)(3).

[7] 5 C.F.R. § 2637.201(c).

[8] *See* footnote 4, *supra.*

APPENDIX C

Memorandum December 17, 2002

TO: Senate Committee on Governmental Affairs
Attention: Cynthia Lesser

FROM: Jack Maskell
Legislative Attorney
American Law Division

SUBJECT: Propriety of Informal Communication from Private Regulated Financial Entity to the Federal Reserve Bank

This memorandum is provided in response to the request from the Committee, as discussed with Cynthia Lesser, as to the propriety under federal law for officials of private financial institutions to call an officer of the Federal Reserve Bank who supervises such private institutions, and to discuss with that official possible, proposed, or desired action by the Federal Reserve Bank concerning a matter regarding a third party which may affect the finances of the private financial institutions. The facts presented by the Committee, and in the press, indicate that an officer of J.P. Morgan Chase, and an officer or employee of Citigroup, called Mr. William McDonough of the Federal Reserve Bank of New York on November 8, 2001, to discuss the potential and expected credit downgrading of Enron Corporation by Moody's the next day, and its potential impact on the financial and energy markets. Although specific recollections are not clear, the calls may have explored the possibility of Federal Reserve Bank intervention into the matter to delay such downgrading, perhaps to stave off a potential blow to the financial markets similar to actions that had been taken regarding the debt of Long Term Capital corporation a few years before. Mr. McDonough apparently informed the callers, however, possibly even before any specific suggestion to intervene was made, that the Federal Reserve Bank would not intervene into this kind of situation.

Unless there are other facts revealed that indicate some specific acts of wrongdoing (such as, for example, the offering of a thing of value in return for, or for or because of, an official act, or the use of federal contract or grant monies to lobby in this situation), there is no apparent violation of any federal law for a private, regulated entity to generally communicate informally with, lobby, discuss, explore, or otherwise suggest or try to persuade officials of federal regulatory departments, agencies, government corporations or sponsored enterprises, concerning matters of public policy, economic policy, or potential governmental action concerning or into matters in which those private entities may have financial interests. It may be noted that business corporations and their representatives have been recognized to possess First Amendment rights to petition the Government and to engage

in advocacy speech with the Government (even when otherwise competitors combine to lobby the Government on a matter of mutual interest to the industry).[1] In certain instances federal departments or agencies may be involved in rule making or another specific administrative procedure or matter which would require that comments or input from outside parties be made in the context of a certain time frame and form,[2] but there is no indication that the Federal Reserve Bank was involved in such proceedings at that time.

---

[1] *Eastern Railroads President Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-138 (1961). *See*, generally, discussion in Eastman, *Lobbying: A Constitutionally Protected Right*, American Enterprise Institute for Public Policy Research (1977).

[2] *Note* provisions of Administrative Procedures Act, at 5 U.S.C. §§ 551 *et seq.* Some agencies, in anticipation of informal contacts and communications from outside parties, require officials to "log" in such calls and communications.