

**Written Testimony of H. David Kotz
Inspector General of the
Securities and Exchange Commission**



**Before the Subcommittee on Oversight and Investigations,
Committee on Financial Services, and Subcommittee on
TARP, Financial Services and Bailouts of Public and
Private Programs, Committee on Oversight and
Government Reform, U.S. House of Representatives
Thursday, September 22, 2011
2:00 p.m.**

Introduction

Thank you for the opportunity to testify before the Subcommittees on the subject of “Potential Conflicts of Interest at the SEC: The Becker Case” as the Inspector General of the U.S. Securities and Exchange Commission (SEC or Commission). I appreciate the interest of the Chairmen, the Ranking Members, and the other members of the Subcommittees, in the SEC and the Office of Inspector General (OIG). In my testimony, I am representing the OIG, and the views that I express are those of my Office, and do not necessarily reflect the views of the Commission or any Commissioners.

I would like to begin my remarks by briefly discussing the role of my Office and the oversight efforts we have undertaken during the past few years. The mission of the OIG is to promote the integrity, efficiency, and effectiveness of the critical programs and operations of the SEC. The SEC OIG includes the positions of the Inspector General, Deputy Inspector General, and Counsel to the Inspector General, and has staff in two major areas: Audits and Investigations.

Our audit unit conducts, coordinates, and supervises independent audits and evaluations related to the Commission’s internal programs and operations. The primary purpose of conducting an audit is to review past events with a view toward ensuring compliance with applicable laws, rules, and regulations and improving future performance. Upon completion of an audit or evaluation, the OIG issues an independent report that identifies any deficiencies in Commission operations, programs, activities, or functions and makes recommendations for improvements in existing controls and procedures.

The Office’s investigations unit responds to allegations of violations of statutes,

rules, and regulations, and other misconduct by Commission staff and contractors. We carefully review and analyze the complaints we receive and, if warranted, conduct a preliminary inquiry or full investigation into a matter. The misconduct investigated ranges from fraud and other types of criminal conduct to violations of Commission rules and policies and the Government-wide conduct standards. The investigations unit conducts thorough and independent investigations in accordance with the applicable Quality Standards for Investigations. Where allegations of criminal conduct are involved, we notify and work with the Department of Justice and the Federal Bureau of Investigation, as appropriate.

Audit Reports

Over the past three and one-half years since I became the Inspector General of the SEC, our audit unit has issued numerous reports involving matters critical to SEC programs and operations and the investing public. These reports have included an examination of the Commission's oversight of the Bear Stearns Companies, Inc. and the factors that led to its collapse, an audit of the Division of Enforcement's (Enforcement) practices related to naked short selling complaints and referrals, a review of the SEC's bounty program for whistleblowers, an analysis of the SEC's oversight of credit rating agencies, and audits of the SEC's real property and leasing procurement process and the SEC's oversight of the Securities Investment Protection Corporation's activities.

Investigative Reports

The Office's investigations unit has conducted numerous comprehensive investigations into significant failures by the SEC in accomplishing its regulatory mission, as well as investigations of allegations of violations of statutes, rules, and

regulations, and other misconduct by Commission staff members and contractors. Several of these investigations involved senior-level Commission staff and represent matters of great concern to the Commission, Members of Congress, and the general public. Where appropriate, we have reported evidence of improper conduct and made recommendations for disciplinary actions, including removal of employees from the federal service, as well as recommendations for improvements in agency policies, procedures, and practices.

Specifically, we have issued investigative reports regarding a myriad of allegations, including claims of failures by Enforcement to pursue investigations vigorously or in a timely manner, improper securities trading by Commission employees, conflicts of interest by Commission staff members, violations of the applicable laws and regulations regarding post-employment activities, unauthorized disclosure of nonpublic information, procurement violations, preferential treatment given to prominent persons, retaliatory termination, perjury by supervisory Commission attorneys, falsification of federal documents and compensatory time for travel, and the misuse of official position and government resources.

In August 2009, we issued a 457-page report of investigation analyzing the reasons why the SEC failed to uncover Bernard Madoff's \$50 billion Ponzi scheme. In March 2010, we issued a 151-page report of investigation regarding the history of the SEC's examinations and investigations of Robert Allen Stanford's \$8 billion alleged Ponzi scheme. In May 2011, we issued a 91-page report of investigation into the circumstances surrounding the SEC's decision to lease approximately 900,000 square

feet of office space at a newly-renovated office building known as Constitution Center, at a projected cost of over \$550 million over ten years.

More recently, on September 16, 2011, we completed a report entitled, “Investigation of Conflict of Interest Arising from Former General Counsel’s Participation in Madoff-Related Matters,” which is the subject of this hearing and is discussed in greater detail below.

Commencement and Conduct of the OIG’s Conflict-of-Interest Investigation

On March 4, 2011, Chairman Mary Schapiro requested that the OIG investigate any conflicts of interest arising from the participation of David M. Becker, the former General Counsel and Senior Policy Director of the Commission, in determining the SEC’s position in the liquidation proceeding brought by the Securities Investor Protection Corporation (SIPC) of Bernard L. Madoff Investment Securities, LLC (the Madoff Liquidation). The Chairman’s request came after she received Congressional inquiries prompted by press reports beginning on February 22, 2011, that the Trustee administering the Madoff Liquidation had brought a clawback suit seeking to recover fictitious profits that had accrued to Becker and his brother as beneficiaries of their mother’s estate when a Madoff account she held was liquidated after her death. The OIG opened an investigation the same day it received the Chairman’s request.

During the course of its investigation, the OIG obtained and searched over 5.1 million e-mails for a total of 45 current and former SEC employees for various time periods pertinent to the investigation, ranging from 1998 to 2011. The OIG also obtained and analyzed internal SEC documents, documentation provided by the Madoff Trustee, Irving H. Picard, Esq., court filings, and press reports. In addition, the OIG conducted

testimony or interviews of 40 witnesses with knowledge of facts or circumstances surrounding the Madoff Liquidation and Becker's work at the SEC.

Issuance of Comprehensive Report of Investigation in Conflict-of-Interest Matter

On September 16, 2011, we issued to the Chairman of the SEC a comprehensive report of our investigation in the conflict-of-interest matter that contained nearly 120 pages of analysis and 200 exhibits. The report of investigation detailed all of the facts and circumstances surrounding the SEC's former General Counsel and Senior Policy Director David Becker's participation in issues in the Madoff Liquidation and other Madoff-related matters, notwithstanding his interest in the Madoff account of his mother's estate.

Results of the OIG's Investigation

Overall, the OIG investigation found that Becker participated personally and substantially in particular matters in which he had a personal financial interest by virtue of his inheritance of the proceeds of his mother's estate's Madoff account and that the matters on which he advised could have directly impacted his financial position. We found that Becker played a significant and leading role in the determination of what recommendation the staff would make to the Commission regarding the position the SEC would advocate as to the calculation of a customer's net equity in the Madoff Liquidation. Under the Securities Investor Protection Act of 1970 (SIPA), where SIPC has initiated the liquidation of a brokerage firm, net equity is the amount that a customer can claim to recover in the liquidation proceeding. The method for determining the Madoff customers' net equity was, therefore, critical to determining the amount the Trustee would pay to customers in the Madoff Liquidation. Testimony obtained from

SIPC officials and numerous SEC witnesses, as well as documentary evidence reviewed, demonstrated that there was a direct connection between the method used to determine net equity and clawback actions by the Trustee, including the overall amount of funds the Trustee would seek to claw back and the calculation of amounts sought in individual clawback suits. In addition to Becker's work on the net equity issue, we also found that Becker, in his role as SEC General Counsel and Senior Policy Director, provided comments on a proposed amendment to SIPA that would have severely curtailed the Trustee's power to bring clawback suits against individuals like him in the Madoff Liquidation.

The following is a summary of the findings of our investigation. We found that Becker, along with his two brothers, inherited an interest in a Madoff account owned by his mother's estate after she died in 2004. Becker testified that he became aware of his mother's estate's Madoff account in or about February 2009 and knew that the account had been opened by his father prior to his death in 2000, was transferred to his mother's estate after her death in 2004, and was liquidated for approximately \$2 million. According to the complaint filed by the Madoff Trustee against Becker and his brothers in February 2011, approximately \$1.5 million of the \$2 million in the Madoff account constituted fictitious profits and, therefore, should properly be clawed back into the fund of customer property for distribution to other Madoff customers.

The OIG investigation found that at the time Becker participated on behalf of the SEC in the net equity issue presented in the Madoff Liquidation, he understood there was a possibility the Trustee would bring a clawback suit against him for the fictitious profits, but asserted that he did not know the likelihood of such a suit. He also acknowledged at

the time that it was at least “theoretically conceivable” that the determination of the extent of SIPA coverage to be afforded Madoff customers could impact whether the Trustee would bring clawback actions against “persons at the margin,” which he considered himself to be. Notwithstanding this knowledge, Becker, who also served as the SEC’s alternate Designated Agency Ethics Official (*i.e.*, the alternate official responsible for coordinating and managing the SEC’s ethics program), worked on particular matters that could impact the likelihood, and even possibility, of a clawback suit against him, as well as the amount that could be recovered in such a clawback action.

Specifically, the OIG investigation found that after Becker rejoined the SEC as General Counsel and Senior Policy Director in February 2009, the SEC’s approach with respect to the net equity determination changed. SIPC and the Trustee proposed to pay customer claims based upon a money-in/money-out method of distribution, under which a Madoff investor would be able to make a net equity claim only for the amount initially invested with Madoff, less any amounts withdrawn over time (Money In/Money Out Method). SIPC and the Trustee believed that the Money In/Money Out method was the only method that was consistent with SIPA as a matter of law, and that SIPA did not allow customers to receive any amount over and above their initial investment with Madoff, *i.e.*, the fictitious returns shown on their Madoff account statements. As of February 2009, SEC officials concurred with SIPC and the Trustee that the Money In/Money Out Method was the appropriate method for determining customer net equity and SIPC officials understood that the Commission was likewise in agreement with this approach.

After Becker rejoined the Commission in late February 2009, and the SEC received submissions from representatives of Madoff claimants who disagreed with the Money In/Money Out Method for determining net equity, including a May 1, 2009 letter to Becker, which advocated a last account statement method for determining customer net equity. Under that method, customers would receive the amount listed as being in their accounts on the last Madoff account statement the customers received (*i.e.*, including the fictitious profits reflected on their statements) (Last Account Statement Method).

The OIG investigation found that after receiving the May 1, 2009 letter, Becker and the Office of General Counsel (OGC) initially gave serious consideration to the Last Account Statement Method. The OIG investigation further found that the prevailing opinion within the SEC and SIPC was that using the Last Account Statement Method would have eliminated the Trustee's ability to bring clawback suits such as the one brought against Becker. Becker himself testified to the OIG that he recalled that one of the reasons given by the Madoff Trustee for his opposition to using the Last Account Statement Method was that if this method was adopted, "we couldn't do any clawbacks." Becker and OGC eventually rejected the Last Account Statement Method and variations of that approach, determining that they could not be reconciled with the law, but continued to consider other methods that would allow Madoff customers to receive more than the amount of their initial investments with Madoff. After consultation with officials from Division of Risk, Strategy, and Financial Management (Risk Fin), Becker ultimately decided to recommend to the Commission a method under which an inflation rate, such as the Consumer Price Index, would be added to the amount of Madoff

customers' initial investments with Madoff to determine the amount they would receive (Constant Dollar Approach).

Accordingly, in late October 2009, eight months after Becker rejoined the Commission, Becker signed an Advice Memorandum to the Commission, which proposed that the Commission support the Madoff Trustee's Money In/Money Out Method, but adjust this approach in a manner that accounts for the "time value" of funds invested in Madoff's scheme pursuant to the Constant Dollar Approach. At an Executive Session of the Commission convened to consider this matter, Becker requested that the Commission authorize the staff to "prepare testimony and write a brief taking the position supporting the trustee on [money-in/money-out], but saying the [money] needs to be described in constant dollar terms." Based upon Becker's recommendation and representations made in the Executive Session, the Commission ultimately voted not to object to the staff's recommendation of the Constant Dollar Approach to the net equity determination.

The OIG investigation found that neither SIPC nor the Trustee believed that the Constant Dollar Approach was appropriate or in conformance with the statute. The President and Chief Executive Officer (CEO) of SIPC stated to the OIG that he specifically recalled telling Becker, in a telephone conversation during which Becker informed him that the Commission would use the Constant Dollar Approach, that there was no justification for such an approach under SIPA. Moreover, the SIPC President and CEO made clear that every proffered methodology, other than the Money In/Money Out Method that was agreed upon by the SEC prior to Becker's rejoining the Commission, would have directly affected Becker's mother's estate's account, and every proffered

methodology would have improved Becker's financial position or the financial position of the account. The SIPC President and CEO explained that using the Constant Dollar Approach would increase the amount that customers' accounts were owed, and accordingly, decrease any amount the Madoff Trustee could have recovered in a clawback suit.

The SIPC President and CEO also stated that, upon learning of Becker's mother's Madoff account, he performed "back of the envelope calculations" to determine the difference of bringing clawback suits under the Constant Dollar Approach, as opposed to the Money In/Money Out Method. Under this calculation, the SIPC President and CEO concluded that by utilizing the Constant Dollar Approach, the amount sought in the clawback suit against Becker and his brothers would be reduced by approximately \$140,000. The OIG recreated the analysis and calculated that a benefit to Becker and his brothers of approximately \$138,500 would result from applying the Constant Dollar Approach in the Becker clawback suit, by adjusting the amount of principal invested of approximately \$500,000 by a percentage inflation adjustment calculated from the Department of Labor's Bureau of Labor Statistics Consumer Price Index Table.

The OIG investigation also found that Becker participated in another particular matter while serving as SEC General Counsel and Senior Policy Director that could have impacted his financial position. In October 2009, the SEC's Office of Intergovernmental and Legislative Affairs (OLA) forwarded Becker a draft amendment to SIPC, as well as TM's analysis of that proposal, and asked Becker if there was "any reason SEC staff should weigh in tomorrow on an amendment to be considered during a House Financial Services Committee markup regarding the ability of the SIPC trustee to do clawbacks."

The proposed amendment entitled, “Clarification Regarding Liquidation Proceedings,” would have amended SIPA to preclude a SIPC trustee from bringing clawback actions against a customer “absent proof that the customer did not have a legitimate expectation that the assets in his account belonged to him.” The effect of this amendment would be to preclude the Trustee from bringing clawback actions like the one against Becker, which were the majority of the clawback suits brought, *i.e.*, suits that did not rely on any knowledge of the alleged wrongdoing.

Although the OIG investigation did find that Becker consulted with the SEC Ethics Office regarding his interest in his mother’s estate’s Madoff account on two separate occasions and that Becker was advised that there was no conflict, we identified concerns about the role and culture of the Ethics Office at the time it provided Becker with clearance to work on the Madoff Liquidation. William Lenox, the now-former Ethics Counsel with whom Becker consulted on both occasions about whether he should be recused from working on the Madoff Liquidation, reported directly to Becker. In fact, just seven months after Lenox provided advice regarding Becker’s participation in the Madoff Liquidation, Becker provided a performance evaluation of Lenox, which concluded, “The performance of the ethics office has been superb The quality of the ethics advice is very high” Lenox also held Becker in extremely high regard. He testified that he had “[g]reat professional respect” for Becker and “an appreciation for his humor and his abilities as a lawyer,” and further described Becker as a “great man and a great lawyer.” Lenox also testified he factored into his analysis of whether Becker should be recused from the Madoff Liquidation the fact that “he was a reputed securities

lawyer who was making a decision to come back and serve the public and protect investors, and he was here to do this sort of analysis.”

In addition, Lenox explained his belief that as Ethics Counsel, the most important thing was that people trust him, and noted that people trusted him with “incredibly personal information.” He viewed his job as “to create a culture where people would seek advice, and to alert those employees – all employees – where the danger lines were, and to encourage them to come and seek ethics advice, because that provides a level of protection.” He stated, “The people who, in the ethics community, that I respect the least are the ones who always say no. If you are a constant naysayer, one, nobody comes to secure advice; two, you’re not actually doing your job.” He further noted, “The key, as I saw it in my job as [Designated Agency Ethics Official] and as ethics counsel, was to make decisions. That’s the reason I was promoted. I was willing to make decisions. That requires a certain amount of willingness to be second-guessed by other people. If you always say no, you’ll never be second-guessed. That was not what I saw my role to be.”

Lenox specifically discussed Becker’s mother’s estate’s Madoff account with him on two separate occasions: first, upon Becker’s return to the SEC in February 2009, and, second, when he received the May 1, 2009 letter advocating the Last Account Statement Method. Only the second discussion was documented in writing, but at no time did Lenox advise that Becker should not participate in any Madoff-related matters and, as discussed below, this advice appears to have been based on incorrect assumptions. The OIG investigation further found that Becker never advised Lenox of the request for his opinion of the SIPA amendment, which would have precluded clawbacks against

individuals in Becker's position, and never sought his advice on whether providing advice on the amendment was improper.

In the second discussion in early May 2009, Becker disclosed to Lenox the details of his mother's account with Madoff, including generally when it was opened and closed, and approximately how much money was invested. He also explained to Lenox that the Madoff Trustee had been bringing clawback suits and that a clawback suit could "[i]n theory" be brought against him. Becker also acknowledged that it was possible that the extent to which SIPA coverage would be available could make it "less likely that the [t]rustee would bring claw back actions against persons at the margin" like him.

Lenox responded, in part, "There is no direct and predictable effect between the resolution of the meaning of 'securities positions' and the trustee's claw back decision. For this reason, you do not have a financial conflict of interest and you may participate." When the OIG interviewed Lenox in this investigation, we learned that Lenox's opinion was based upon the incorrect understanding that the SEC's participation in the Madoff Liquidation was solely an advisory one, when, in fact, the SEC is a party to the liquidation proceeding and may request the court to compel SIPC to do as it wishes. Becker himself acknowledged in his OIG testimony that consistent with its role as a party, the SEC's participation in the net equity issue in the Madoff Liquidation was not theoretical. Becker noted that it was his understanding that if SIPC disagreed, the SEC should eventually recommend that the court adopt the SEC's position, not SIPC's position, and indicated that "[t]he Commission had done that in the past and may do it again."

We found that Lenox's advice was also based upon the incorrect assumption that the interpretation of SIPA for purposes of claim determination was a separate and distinct legal question from the trustee's decision of from whom to institute a clawback suit, and completely ignored any impact on the calculation of the amount to be clawed back. We also found no evidence that Lenox took any further steps to better understand the extent and nature of Becker's involvement in the Madoff Liquidation, and Becker testified that he did not recall Lenox asking for additional facts or directing him to seek additional guidance if new facts arose.

The OIG investigation further found that notwithstanding the importance Lenox had placed on appearance matters in his communications to SEC employees, he did not even reference appearance considerations in his May 2009 written advice to Becker. Nonetheless, Lenox testified that he did consider appearance issues when advising Becker and, in fact, concluded that Becker's participation in the Madoff Liquidation matter passed the "appearance of impropriety test." Lenox himself had described that test in an ethics bulletin issued to all SEC employees as follows:

What are the optics of the situation; what is the context of the facts and circumstances? Would it pass what has often been referred to as the *New York Times* or *Washington Post* test? If what you propose doing becomes the subject of an article in the press, would you not care or would it look like you were doing something wrong? Even if you wouldn't care, what effect would the story have on the SEC and your fellow employees?

Even with the advantage of hindsight and given the intense press scrutiny and criticism of Becker's work on Madoff-related matters in the *Washington Post* and *New York Times*, Lenox indicated in testimony before the OIG that he stands by his conclusion that Becker's involvement in the SEC determinations in the Madoff Liquidation passed this appearance test.

The OIG investigation further found that the Ethics Office considered Becker's participation differently in other matters than it did in the Madoff Liquidation and that Becker himself took a more conservative stance on recusals in other non-Madoff matters. Moreover, the OIG investigation found that the Ethics Office considered recusals in Madoff-related matters differently in situations that did not involve Becker. In fact, shortly after Madoff confessed, Lenox, as Ethics Counsel, sent a memorandum to all Commission employees regarding mandatory recusal from *SEC v. Madoff* in a broad variety of circumstances. The memorandum stated, "[A]ny member of the SEC staff who has had more than insubstantial personal contacts with Bernard L. Madoff or Mr. Madoff's family shall be recused from any ongoing investigation of matters related to *SEC v. Madoff*." The memorandum further set forth certain contacts that required recusal, including being invited to or visiting any Madoff family members' homes or being an active member of the same social or charitable organizations.

The OIG investigation found that with respect to employees within OGC besides Becker, the Ethics Office took a more conservative approach for recusal from Madoff-related matters, including the Madoff Liquidation. For example, the Ethics Office advised an OGC staff attorney that she had a conflict from working on any aspect of the Madoff Liquidation because she "spent a very small amount of time in private practice working on a question related to the Madoff bankruptcy."

The OIG investigation also found that former Ethics Counsel Lenox was not the only individual in the Commission who was aware of Becker's mother's estate having an account with Madoff prior to the time this issue appeared in the press in February 2011. Both Becker and Chairman Schapiro recalled that, around the time of his return to the

SEC in February 2009, Becker discussed his mother's estate's Madoff account with her. While their recollections of the substance of the conversation are not entirely consistent, the evidence clearly shows that Becker advised Chairman Schapiro that his mother had had an account with Madoff, she had died several years before, and the account had been liquidated. Chairman Schapiro did not recall asking Becker any questions after he told her about his mother's account, and did not recall whether Becker said anything about seeking advice from the Ethics Counsel regarding the account, although Becker testified he must have mentioned to her that he would consult with Lenox. At that time, Chairman Schapiro did not consider Becker's personal financial gain "in any way, shape, or form" or whether he would be subject to a clawback action. Indeed, Chairman Schapiro testified that she would have had Becker recused from the net equity determination if she had known he was potentially subject to a clawback suit or "understood that he had any financial interest in how this [was] resolved"

In addition, the issue of Becker's mother's estate's Madoff account was discussed by several SEC senior officials in the fall of 2009, when the SEC learned that the U.S. House of Representatives Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises was scheduling a hearing on SIPC and Madoff victims. Shortly after the SEC learned that the Congressional testimony would focus on legal aspects of the SIPC/Madoff issues, Chairman Schapiro suggested that Becker testify on behalf of the SEC at the hearing. The OLA Director then had a conversation with Becker, during which Becker informed him that his mother had a Madoff account from which he "had gotten an inheritance." Becker also testified that he told the OLA Director that "if [he did] testify, [he] would put at the beginning, [he] would mention [his], the fact of [his]

mother's account with Madoff." Becker testified that after this conversation, the OLA Director contacted him later in the day and said, "You know, now that I think about it, I think it would be better if somebody else testified. My concern is – not that there's anything inappropriate, but my concern is [] that when you're in a political environment, people might want to make something of that, and it would be a distraction rather than focusing on what the Commission's position was and why."

Becker testified that either the evening of his conversation with the OLA Director or the following morning, he spoke with Chairman Schapiro about his mother's account. Chairman Schapiro recalled the conversation with Becker and stated, "I recall saying that if David [Becker] did testify, we needed to make it absolutely clear to Congress that there was this connection, remote though I believed it to be, that his long-deceased mother had had an account at Madoff, so that nobody would be surprised by that, so that we were completely forthcoming with Congress." Becker testified that he was certain that it was he who said in the meeting with Chairman Schapiro that if he were to testify, he would disclose his mother's account with Madoff. The OIG investigation found that eventually, the OLA Director made the decision not to have Becker testify. The SEC Deputy Solicitor, who had been suggested by Becker as a possible replacement witness, testified in Becker's stead at the subcommittee hearing which occurred on December 9, 2009, and involved discussions of clawbacks. In the end, Becker's Madoff interest was not disclosed to Congress.

Moreover, the OIG investigation found that although the decision was made that should Becker testify before Congress, he would disclose his mother's Madoff account, during this November 2009 timeframe, the fact of Becker's interest in his mother's

estate's Madoff account was not disclosed to the Commissioners or the bankruptcy court, notwithstanding the fact that the Commission was considering Becker's recommendation on the net equity position to take in court at this very time. SEC Commissioner Aguilar testified that it was "incredibly surprising and incredibly disappointing that there was enough awareness to know that the conflict existed to prevent [Becker] from giving [this] testimony, yet the decision-makers at the Commission were not provided that information."

In all, the OIG investigation found that, prior to the public disclosure of Becker's mother's Madoff account, at least seven SEC officials were informed at one time or another about that account, including the Chairman, the then-Deputy General Counsel and current General Counsel, the Deputy Solicitor who testified at the hearing in Becker's stead, the OLA Director, a Special Counsel to the Chairman, and two Ethics officials (Lenox and one of his colleagues in the Ethics Office). Yet, none of these individuals recognized a conflict or took any action to suggest that Becker consider recusing himself from the Madoff Liquidation.

After we concluded the fact-finding phase of our investigation, we provided to the Acting Director of the Office of Government Ethics (OGE) a summary of the salient facts uncovered in the investigation, as reflected in our report. We requested that OGE review those facts and provide the OIG with its opinion regarding Becker's participation in matters as the SEC's General Counsel and Senior Policy Director that could have given rise to a conflict of interest. After reviewing the summary of facts provided by the OIG, the Acting Director of OGE advised us that in his opinion, as well as that of senior attorneys on his staff, Becker's work both on the policy determination of the calculation

of net equity in connection with clawback actions stemming from the Madoff matter, and his work on the proposed legislation affecting clawbacks should be referred to the United States Department of Justice for consideration of whether Becker violated 18 U.S.C. § 208, a criminal conflict of interest provision. Based upon this guidance, the OIG has referred the results of its investigation to the Public Integrity Section of the Criminal Division of the United States Department of Justice.

Recommendations of the OIG's Investigation

Based upon the findings in our report, we recommended that, in light of David Becker's role in signing the October 28, 2009 Advice Memorandum and participating in the November 2009 Executive Session at which the Commission considered OGC's recommendation that the Commission take the position that net equity for purposes of paying Madoff customer claims should be calculated in constant dollars by adjusting for the effects of inflation, the Commission reconsider its position on this issue by conducting a re-vote in a process free from any possible bias or taint. We further recommended that once the re-vote has been conducted, the Commission should advise the United States Bankruptcy Court for the Southern District of New York of its results and the position that the Commission is adopting.

The OIG also recommended with respect to the Ethics Office that:

- (1) The SEC Ethics Counsel should report directly to the Chairman, rather than to the General Counsel.
- (2) The SEC Ethics Office should take all necessary steps, including the implementation of appropriate policies and procedures, to ensure that all advice provided by the Ethics Office is well-reasoned, complete, objective, and consistent, and that Ethics officials ensure that they have all the necessary information in order to properly determine if an employee's proposed actions may violate rules or statutes or create an appearance of impropriety.

- (3) The SEC Ethics Office should take all necessary actions to ensure that all ethics advice provided in significant matters, such as those involving financial conflict of interest, are documented in an appropriate and consistent manner.

We are confident that under Chairman Schapiro's leadership, the SEC will review our report and take appropriate steps to implement our recommendations to ensure that the concerns identified in our investigation are appropriately addressed.

Conclusion

In conclusion, I appreciate the interest of the Chairmen, the Ranking Members, and the Subcommittees in the SEC and my Office and, in particular, in the facts and circumstances pertinent to our conflict-of-interest report. I believe that the Subcommittees' and Congress's continued involvement with the SEC is helpful to strengthen the accountability and effectiveness of the Commission. Thank you.