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Indeed, there is substantial evidence (albeit mostly testimonial) from numerous and varied sources of Aguirre's inability to work well with his supervisors, colleagues, and opposing counsel, and there is substantiated evidence of Aguirre's conflicts in the workplace. Although Aguirre claims all of this evidence has been orchestrated by "interested parties," the breadth of this evidence suggests that this is unlikely.

However, the record also shows that the issue of taking Mack's testimony was a matter Aguirre's supervisors were discussing around the same time period they decided to terminate him, and Hanson recalled that they discussed the issue of Aguirre seeking to take Mack's testimony at the meeting in which Thomsen made the decision to terminate Aguirre. In fact, the same e-mail that proposed Aguirre's termination directly followed an e-mail from Aguirre in which he provided a justification for taking Mack's testimony. Moreover, Berger acknowledged that "the fact that [Aguirre] simply wouldn't listen with respect to Mack must have played some part in Mark [Kreitman's] and Bob [Hanson's] assessment of his conduct."

Accordingly, the evidence does show that although Aguirre's supervisors may have had concerns about Aguirre's performance or conduct throughout his tenure with the Commission, he was not given negative feedback until he began pushing to take Mack's testimony. In fact, he had been recommended for a two-step merit increase just a few weeks earlier. Thus, in light of all the evidence, it is not credible to find that the termination decision was totally unrelated to Aguirre's efforts to take Mack's testimony, as Aguirre's supervisors claimed. In addition, the timing of the supplemental evaluation evidences that complaints made about Kreitman's management style also played a role in the decision to issue this unprecedented document to Aguirre.

Moreover, although there was evidence that Enforcement had a legitimate basis for terminating Aguirre in his probationary period, the evidence also shows that few employees in Enforcement, even in their probationary periods, have historically been terminated, and Enforcement management has tolerated much worse conduct on the part of Kreitman, and even Hanson.

Report's Conclusion and Recommendations

The OIG investigation found that Enforcement, and particularly Gary Aguirre's first and second-level supervisors, Hanson and Kreitman failed to fulfill their management responsibilities toward Aguirre and conducted themselves in a manner that raised serious questions about the impartiality and fairness of the Pequot investigation.

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The OIG investigation also found that although Aguirre's supervisors expressed that they had significant concerns about Aguirre's performance and conduct throughout his tenure with the Commission, they failed to provide him with timely feedback of these concerns, denying him any ability to improve or change his behavior. In fact, the record demonstrates that Aguirre was not given any significant negative feedback until he began pushing to take the testimony of a prominent individual in the financial industry, John Mack.

Moreover, in conversations between Aguirre's direct supervisor, Hanson, and Aguirre about the taking of Mack's testimony, Hanson used the term "political clout" and referred to Mack's counsel as having "juice," thus conveying the impression that political clout was a factor in the decision to deny Aguirre the ability to take Mack's testimony. In addition, the record shows that the approach adopted by Hanson and Assistant Director Kreitman in connection with the Pequot investigation, and specifically the decision concerning the taking of Mack's testimony, was different from the approach utilized in other Enforcement cases.

In addition, even if one accepts Hanson's explanation that the "juice" he was referring to related to the ability to reach out to senior Enforcement officials, this "juice" did, in fact, materialize, as both Associate Director Paul Berger and Director Linda Thomsen were contacted by Morgan Stanley officials about the investigation as it pertained to Mack.

The record further shows that after the Morgan Stanley contacts were made, relevant information was imparted to representatives of Morgan Stanley by both Berger and Thomsen regarding the extent of evidence that Enforcement had against John Mack in connection with the Pequot investigation. Commission conduct regulations prohibit divulging confidential and non-public information in circumstances where the Commission has determined to accord such information confidential treatment. 17 CFR § 200.735-3(b)(7)(i). Information obtained by the Commission in the course of any investigation, unless made a matter of public record, is specifically deemed to be "non-public." 17 CFR § 203.2. According to Commission policy regarding disclosure of nonpublic information in connection with investigations, the prohibitions against use of nonpublic information without specific authorization or approval by the SEC does not apply to the use of such materials as necessary or appropriate by members of the staff in pursuing SEC investigations, or in the discharge of other official responsibilities. SECR 19-1.

Although Commission regulations do not define specifically in what circumstances nonpublic information may be disclosed, and Thomsen may have legitimately believed the information she provided was necessary in the discharge of her responsibilities, there are serious questions about the appropriateness of the information Thomsen and Berger provided to Morgan Stanley. First, there is clearly a disconnect within Enforcement about this issue. Second, the fact that both Berger and Thomsen

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provided information without conferring with the attorney who had primary responsibility for the investigation is problematic, and created an appearance that they were providing Mack preferential treatment. Third, learning the extent of the information the Commission had against a potential target (i.e., that there was no "smoking gun" evidence in the hands of Enforcement), could prove very useful in preparing a defense. Fourth, the information was provided specifically because John Mack was being considered for a high-level position in a large investment bank, and would not be available to another potential target of lesser means or reputation.

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

Nonetheless, the OIG investigation did find that Aguirre's supervisors' explanation of why they felt it appropriate to wait to take Mack's testimony was a plausible one. In addition, while several other individuals who worked with Aguirre on the Pequot investigation concurred with Aguirre's request to take Mack's testimony in July or August of 2005, they also generally indicated that it was not per se improper to wait to obtain more information before bringing in Mack. Moreover, the investigation did not find that Enforcement cases are generally affected by political decisions or the prominence of the defendants.

The investigation also found that although there is evidence that the Pequot investigation changed focus after Aguirre was terminated and Enforcement seems to have "gone through the motions" with respect to the taking of Mack's testimony, the evidence does not show that the Pequot investigation was abandoned. To the contrary, while there was a shift by Enforcement away from the John Mack aspect of the investigation based upon the belief that other aspects of the investigation were more promising, there is substantial evidence that the Pequot investigation continued to be aggressively pursued until it was closed in November 2006.

However, the OIG investigation finds that there was a connection between the decision to terminate Aguirre and his seeking to take Mack's testimony.

The record demonstrates that after the communications with Morgan Stanley, and while a two-step merit increase that had been recommended for Aguirre was being processed, Aguirre's supervisors prepared a supplemental evaluation, which criticized Aguirre for being "resistant to supervision" and referenced complaints from opposing counsel. It also noted that he "expresses resentment at what he inaccurately perceives as attempts by his supervisors to thwart his success."

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The supplemental evaluation was not placed in Aguirre's personnel file, and the evidence suggests the substance of the supplemental evaluation may never have been conveyed to Aguirre. In addition, several other Enforcement lawyers, some of whom had worked for many years in the Enforcement Division, had never seen or even heard of a supplemental evaluation.

Within a short time period after the supplemental evaluation was prepared, while Aguirre was continuing to seek approval to take Mack's testimony, Director Thomsen made the decision to terminate Aguirre in a meeting with Berger, Hanson and Kreitman, during which they all recommended that Aguirre be terminated. Thomsen, Berger, Hanson and Kreitman all referenced Aguirre's inability to work well with others as the basis for Aguirre's termination and, in fact, there is substantial evidence of Aguirre's conflicts with co-workers, supervisors and opposing counsel.

However, the record also shows that Aguirre's supervisors were discussing the issue of taking John Mack's testimony around the same time period, perhaps, even in that meeting. In fact, the e-mail that proposed Aguirre's termination directly followed an e-mail from Aguirre in which he provided a justification for taking Mack's testimony. In addition, Berger acknowledged that "the fact that [Aguirre] simply wouldn't listen with respect to Mack must have played some part in Mark [Kreitman's] and Bob [Hanson's] assessment of his conduct." Accordingly, and in light of all the evidence, it is not credible to find that decision to terminate Aguirre was totally unrelated to Aguirre's efforts to take Mack's testimony.

In addition, the timing of the supplemental evaluation evidences that complaints made about Kreitman's management style also played a role in the decision to issue this unprecedented document to Aguirre.

Furthermore, although there was evidence that Enforcement had a legitimate basis for terminating Aguirre in his probationary period, the evidence also shows that few employees in Enforcement, even in their probationary periods, have historically been terminated, and Enforcement management has tolerated much worse conduct on the part of both Kreitman and Hanson.

During the course of the investigation, numerous former and current subordinates of Kreitman came forward, after requesting confidentiality, to describe the atmosphere of "abuse" and "unfairness" that pervaded the office under Kreitman's leadership. These Enforcement attorneys described Kreitman's management style as "abusive," "dictatorial," "arbitrary," and "autocratic." These employees gave examples of Kreitman berating both his subordinates and outside counsel on a fairly regular basis. They also described their intense fear of retaliation and gave accounts of how it was fruitless to complain about Kreitman since upper management would not take appropriate action.

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There were also significant concerns expressed about Bob Hanson's management style. He was described as a "micro-manager" who "harassed" subordinates, but gave little or no substantive feedback. In all, the atmosphere under Kreitman and Hanson was described as "unpleasant" and "frustrating" and made it extremely difficult for Aguirre to succeed at his job.

Thus, the OIG investigation finds that Enforcement failed in numerous respects in how it managed Gary Aguirre and allowed inappropriate reasons to factor into its decision to terminate him. Accordingly, the Inspector General recommends that this report be provided to the Chairman, Chief of Staff, and Executive Director for actions consistent with the following recommendations:

1. Appropriate disciplinary and/or performance-based action against Mark Kreitman, including removal of his supervisory responsibilities;

2. Appropriate disciplinary and/or performance-based action against Robert Hanson, including removal of his supervisory responsibilities;

3. Appropriate disciplinary and/or performance-based action against Linda Thomsen;

4. Clarification of the Commission's policies on the disclosure of nonpublic information in the context of Enforcement investigations and training of Enforcement employees, with respect to, inter alia, the appropriateness of disclosing the extent of evidence against a person of interest in an ongoing investigation; and

5. Reassessment and clarification to staff of Enforcement's practice that allow outside counsel the opportunity to communicate with those above the line attorney level on behalf of their clients when they have issues or disagreements with the Enforcement lawyers with whom they have been dealing to ensure that such policy does not result in favorable treatment, or the appearance thereof, for prominent individuals and their counsel.

Submitted: Date: Sept. 30, 2008

H. David Kotz, Inspector General