MARY JO WHITE, THE SEC, AND THE REVOLVING DOOR

• JUNE 2015 •

A SPECIAL REPORT BY

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EXECUTIVE SUMMARY: MARY JO WHITE, THE SEC, AND THE REVOLVING DOOR

The core purpose of the U.S. Securities and Exchange Commission (hereinafter "the SEC") is to protect outsiders from insiders. Founded in the wake of the Great Depression in response to "a consensus that for the economy to recover, the public's faith in the capital markets needed to be restored," the SEC is intended to ensure that corporations and the financial sector treat everyone else honestly.[1]

As the SEC's website summarizes the laws that gave it life,

> The main purposes of these laws can be reduced to two common-sense notions:
> - Companies publicly offering securities for investment dollars must tell the public the truth about their businesses, the securities they are selling, and the risks involved in investing.
> - People who sell and trade securities – brokers, dealers, and exchanges – must treat investors fairly and honestly, putting investors' interests first.[2]

The SEC's role is thus necessarily antagonistic to the interests of those entrenched insiders who choose to seek the easiest and least ethical path toward profit. And the SEC's critical mission means that few if any regulators (other than the Chair of the Federal Reserve) have more influence on financial regulation than Mary Jo White, the Chair of the SEC.

President Obama's 2013 nomination of Mary Jo White to this high profile position was well received, and White was confirmed by the Senate by voice vote, viewed as uncontroversial and well qualified.[3] White's voice vote (4/8/13) was merely two months and one day after her nomination was formally sent to Congress (2/7/13),[4] a rapid confirmation unusual for a presidency that had been obstructed at historic rates.[5]

Mary Jo White's quick confirmation seems to reflect the effectiveness of the framing of White as a law enforcer. President Obama's reference to White's past service as US Attorney for the Southern District of New York—"You don't want to mess with Mary Jo."—has become iconic. The press reaction to the White nomination was filled with

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[1] http://www.sec.gov/about/whatwedo.shtml
[2] http://www.sec.gov/about/whatwedo.shtml
[3] "Without fanfare, the Senate approved White by unanimous consent, signaling that because she had strong bipartisan support, an official vote count was not necessary. [. . .] White, a former federal prosecutor who has spent the past decade as a white-collar attorney in New York, dazzled lawmakers from both parties with her credentials. She sailed through her confirmation hearing with a 21 to 1 vote last month, despite previous concerns about her strong ties to Wall Street. [...] White is untested as a regulator, but she has daunting regulatory agenda ahead of her, including putting in place regulations required by the Dodd-Frank act and the more recent Jumpstart Our Business Startups Act, which includes the mandate for the crowdfunding rule and aims to help small, private firms raise money and grow." http://www.washingtonpost.com/business/economy/mary-jo-white-confirmed-as-sec-chief/2013/04/08/51604298-a099-11e2-82bc-511538ae90a4_story.html
[4] https://www.congress.gov/nomination/113th-congress/136?q=%7B%22search%22%3A%5B%22MARY+JO+WHITE%22%5D%7D
[5] *See, e.g.,* http://www.politifact.com/truth-o-meter/statements/2013/nov/22/harry-reid/harry-reid-says-82-presidential-nominees-have-been/ , http://blogs.wsj.com/washwire/2013/11/21/do-obama-nominees-face-stiffer-senate-opposition/

expectations that White would serve as "Wall Street's sheriff:"[6] indeed, a Google search for "'Mary Jo White' Wall Street sheriff" produces more than 26,000 hits.[7] The *New York Times* timeline on her career is entitled "Mary Jo White — From Prosecutor to Regulator: Before President Obama named Mary Jo White to run the Securities and Exchange Commission, she was the top federal prosecutor in New York,"[9] despite the fact that White spent more time at a Wall Street law firm than as a prosecutor.

Thus, when on June 2nd Senator Elizabeth Warren sent a 13 page open letter to Chair White cataloguing why the Senator found the Chair's time at the SEC thus far to have been "extremely disappointing,"[10] it sent shockwaves. This summary from *Politico* accurately characterizes the reaction to Warren's letter:

> Wall Street and the White House had a swift and furious reaction to Elizabeth Warren's blazing attack on Securities and Exchange Commission Chair Mary Jo White: Senator, you've gone too far. Defenders of White's tenure at the regulatory agency said Warren's 13-page letter attacking the SEC chair raised highly questionable points and badly mischaracterized **the actions of a widely respected former federal prosecutor**.[11]

As this quote suggests, White's reputation continues to play an outsized role in defenses of White, even as observers at *Bloomberg* note that her "two-year tenure heading the securities regulator has been marked largely by discord and paralysis rather than accomplishments."[12] For instance, the June 8th *Washington Post* Editorial Board defense of White's time at SEC led by invoking White's career in a way that gave the reader no indication that White had ever worked for Wall Street:

> MARY JO White is a rarity in Washington — a seasoned federal prosecutor, an expert on securities law and a true independent, in both party registration and attitude. Those attributes made her President Obama's choice to chair the Securities and Exchange Commission (SEC), the independent agency that makes and enforces regulations for the financial industry.[13]

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[6] See, e.g., USA Today: "The nomination of White, a 65-year-old lawyer and avid tennis player who has shuttled between jobs as a prosecutor and white-collar-crime defense lawyer, fuels expectations that the SEC will rev up its response to criticism that it hasn't been tough enough in overseeing the nation's securities laws and serving as Wall Street's sheriff."
http://www.usatoday.com/story/money/business/2013/01/24/mary-jo-white-bio/1861213/

[7] https://www.google.com/search?biw=1517&bih=736&q=%22mary+jo+white%22+wall+street+sheriff&oq=%22mary+jo+white%22+wall+street+sheriff (26,000 figure from search June 14, 2015)

[9] http://www.nytimes.com/interactive/2015/02/24/business/dealbook/timeline-mary-jo-white.html

[10] http://www.warren.senate.gov/files/documents/2015-6-2_Warren_letter_to_SEC.pdf

[11] http://www.politico.com/story/2015/06/elizabeth-warren-mary-jo-white-criticism-118537.html#ixzz3cTub5LGY

[12] http://www.bloomberg.com/news/articles/2015-05-21/mary-jo-white-s-sec-is-the-agency-that-barely-moves

[13] http://www.washingtonpost.com/opinions/the-secs-steady-hand/2015/06/07/6cec9a1c-0bb7-11e5-a7ad-b430fc1d3f5c_story.html

A deeper dig into White's career indicates that not only has White's tenure at the SEC been troubling, it has been a disappointment very much in keeping with her professional track record. Her defenders are right in one very important regard: White has in fact led the SEC exactly as one might expect she would based on her career.

White's career serves as an emblematic example of what is problematic about the revolving door; indeed, she is also a proponent of the revolving door in her hiring and in her personal statements. Her position on the SEC leads to an insolvable dilemma: her lengthy and lucrative ties to Wall Street (Section A below) lead to justifiable calls for frequent recusal, and her frequent recusals (see Section F) lead to frequent deadlock in the commission, preventing adequate enforcement. White's tendency to hire people for high ranking jobs at the SEC who are likely to avoid stringently enforcing laws protecting society from the dangers of the insiders and large banks for whom they will go to work for next (see Section E) is emblematic of her ideology opposing strong white collar criminal enforcement (see Sections (C) and (D)).

And perhaps nothing better illustrates the crisis of the revolving door at the SEC than "The Pequot Affair," (Section B) in which White played an important, albeit supporting role. There, as throughout this report, White's behavior fits the Washington DC adage, "The scandal isn't what's illegal, the scandal is what's legal."[14]

As Chair of an Independent Agency that has both rulemaking power and rule-enforcing responsibility, White has the opportunity to secure and deepen improvements in financial regulation, or to scuttle much of the significant but imperfect progress that has been made. An effective Chair of the SEC must have a mindset that is of, by, and for the outsiders whom our laws seek to protect. Instead, White both embodies and promotes the revolving door between government regulator and regulated industry that empowers Wall Street insiders at the expense of investors and society writ large.

Society has an interest in an SEC that really plays the thus far mythical role of "Sheriff of Wall Street" that President Obama promised White would create. We need Commissioners of the SEC who do not embody the revolving door, who do not represent insolvable recusal dilemmas, and who are not already eyeing a post-government job working on or for Wall Street.

The false promise of the White era at the SEC can and should serve as a teachable moment. Instead of returning again and again to the revolving door, pending and future SEC Commissioner openings should be an opportunity to empower leaders from more diverse backgrounds, such as public service, think tanks, or academia.

[14] Generally, although potentially somewhat errantly, attributed to Michael Kinsley, http://www.barrypopik.com/index.php/new_york_city/entry/in_washington_the_scandal_isnt_whats_illegal_the_scandal_is_whats_legal

(A) DEBEVOISE 3.0

Mary Jo White's defenders prefer to refer to her as a former federal prosecutor, but her most enduring professional relationship has been with elite New York City Wall Street law firm Debevoise & Plimpton (hereinafter "Debevoise"). White worked at Debevoise from 1976-1978, then returned from a stint as a prosecutor as a litigation partner at the firm from 1983 to 1990. Finally, from 2002 until becoming Chair of the SEC, "White became chair of the litigation department at Debevoise & Plimpton in New York, where she led a team of more than 200 lawyers."[15]

That third, most recent stint at Debevoise saw her career flourishing at the leading edge of a newly entrenched form of revolving door attorney, whereby former government officials could serve at the intersection of their corporate clients and their former colleagues in government service.

1. WHITE WAS MAJOR RAINMAKER AT DEBEVOISE

WHITE'S RETURN TO DEBEVOISE WAS EXPLICITLY ABOUT WHITE COLLAR CRIMINAL DEFENSE

"Mary Jo White, the former US attorney in New York who prosecuted terrorists, mobsters and bankers, is returning to Debevoise & Plimpton, the international law firm where she was a partner for much of the 1980s. White rejoins the firm as partner and chair of its 150-lawyer litigation department. Debevoise has its headquarters in New York and has offices in Washington, London, Paris, Frankfurt, Hong Kong and Moscow. **She plans to focus on internal investigations and the defence of companies and individuals who have been accused of involvement in white-collar or corporate crime and civil securities law violations**."[16] (emphasis added)

MARY JO WHITE'S LUCRATIVE INVESTIGATION BUSINESS PLAYED A BIG ROLE IN INCREASING PROFITS FOR DEBEVOISE PARTNERS

"In the past, Debevoise's prestige has arguably outpaced its profits. It's often ranked more highly on the Vault 100 than on the Am Law 100 (when ranked by profits per partner). In the most recent rankings, Debevoise was #13 on the Vault 100 and #20 on the Am Law 100 by PPP. Perhaps that's about to change. From Legal Week (via Law.com):

'Debevoise & Plimpton has unveiled stellar financial results for 2007, with the New York law firm seeing both partner profits and fees climb by more than 20 percent over the last 12 months. Profits per equity partner (PEP) at Debevoise rose by 26.5 percent from $1.81 million last year to a new high of $2.29 million. Global revenue, meanwhile, was up by 23.4 percent from $575 million in 2006 to $709.54 million.'

[15] http://www.sec.gov/about/commissioner/white.htm

[16] "NY firm recruits ex-US attorney PEOPLE," Financial Times (London, England), April 12, 2002 Friday, USA Edition 1, By NAOMI MAPSTONE, LISA WOOD - EDITOR and HOLLY YEAGER.

A source who passed along this news added: "Although not mentioned in the article, several large investigations are the driving force behind these numbers." Of course, that's not surprising. **Thanks in large part to former U.S. Attorney Mary Jo White, internal investigations have long been a mainstay of Debevoise's practice. They're long-running and lucrative, since no company in deep doo-doo wants to look like it's skimping on self-scrutiny. See, e.g., Siemens (aka Debevoise cash cow).**"[17] (emphasis added)

"HUGE PAYOFF" TO LAWYERS FROM THE REVOLVING DOOR – ATTORNEYS LIKE WHITE ARE SEEN AS ABLE TO "RESTORE SOME CREDIBILITY WITH INVESTORS" AND TO HELP CLIENTS "CATCH A BREAK FROM PROSECUTORS AND REGULATORS"

"**Corporate meltdowns, the bane of so many investors and innocent employees, are turning out to have an upside for lawyers such as Mr. McLucas, who are specialists in internal corporate investigations. Such probes are launched by anxious managers or directors looking to get to the bottom of allegations of internal wrongdoing. The idea: restore some credibility with investors, and it is hoped, catch a break from prosecutors and regulators.** David Boies, Al Gore's lawyer in the 2000 presidential election recount and the government's lead prosecutor in the Microsoft antitrust case, recently surfaced as counsel to a special board committee investigating Tyco. **Other new entrants in what is becoming a growth industry include former SEC general counsel David Becker, who recently joined New York's Cleary, Gottlieb, Steen & Hamilton, and Mary Jo White, the former U.S. attorney in New York, who recently rejoined her old law firm, Debevoise & Plimpton. "It is obviously a climate that calls out for a certain kind of expertise and credibility with the government," Ms. White says. "Lots of us are very busy." For the lawyers, the payoff can be huge.** [. . .]

For companies, the push to investigate, in part, is driven by the U.S. Justice Department and the SEC, which in recent years have developed guidelines that take into account corporate cooperation in weighing whether to prosecute or impose fines and other penalties."[18] (emphasis added)

THE CORPORATE CLIENT DEMAND FOR A FORMER US ATTORNEY WAS SO STRONG THAT DEBEVOISE HAD TO HIRE A SPECIFIC STAFFER TO FIELD REQUESTS FOR WHITE'S TIME

"In 2002, White resigned and returned to Debevoise & Plimpton. The firm had to hire someone just to field the client requests for her—not only from banks but also from corporations that were under investigation (Siemens, Hospital Corporation of America), institutions (the National Football League, the Roman Catholic Diocese of Albany), and famous people (Rosie O'Donnell, Tommy Hilfiger). Not so long ago, few white-shoe law firms had lawyers devoted to defending clients against investigation and prosecution. Now they all do."[19]

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[17] http://abovethelaw.com/2008/03/debevoises-delicious-dough-but-beware-biglaw-bigwigs-new-york-dems-want-their-share/

[18] "Corporate Probes Prove a Growth Industry for Lawyers --- Anxious Managers and Directors Hope Investigations Will Restore Credibility With Investors," by Richard B. Schmitt, The Asian Wall Street Journal, July 1, 2002, Pg. A7.

[19] http://www.newyorker.com/magazine/2013/11/11/street-cop

WHEN WHITE WENT BACK TO DEBEVOISE, IT WAS "BULLISH TIMES" FOR REVOLVING DOOR BETWEEN PROSECUTORS & WHITE COLLAR DEFENSE

"These are bullish times for government attorneys who want to jump from prosecuting bad guys to defending them. The expansion in white-collar practices, already three years strong, is showing no sign of slowing. Law firms and corporations are snapping up emigres primarily from the Justice Department and the Securities and Exchange Commission. The ex-feds bring frontline experience handling cases in front of juries, negotiating deals outside of the courtroom and running internal investigations. The volume of work is exploding because federal and state prosecutors, such as New York state Attorney General Eliot Spitzer, have an unquenchable appetite for seeking out and punishing fiscal wrongdoing.

"**Without question, this practice area is booming," says Mary Jo White. A former chief prosecutor in New York's Southern District, she is now head of the litigation group at Debevoise & Plimpton, which boasts 10 former feds on its roster. "At the moment, we are getting so many offers for white-collar work that we can't take all of it on**."[20] (emphasis added)

2. CASE STUDY: SIEMENS

WHITE'S DEBEVOISE WHITE COLLAR TEAM BILLED SIEMENS HUNDREDS OF MILLIONS OF DOLLARS

"German engineering giant Siemens AG hired New York law firm Debevoise & Plimpton LLP more than a year ago to get to the bottom of a bribes-for-business scandal to try to blunt possible U.S. sanctions. But as investors descend on Munich for Siemens's annual shareholder meeting tomorrow, the firm hasn't been able to deliver much clarity. A top Siemens official and others praise the firm's work. Still, Debevoise has been held back by the absence of subpoena powers, wary Siemens employees and its lawyers' own missteps, say people close to the probe.

The exercise is proving a costly one for Siemens. It already has paid 347 million euros ($507 million) in the fiscal year ended Sept. 30 to outside advisers trying to sort out the matter, though neither Siemens nor Debevoise will disclose how much of that the law firm received. Since a police raid of its headquarters in late 2006, Siemens has identified 1.3 billion euros in suspicious transactions. The conglomerate is the target of criminal probes in several countries, including the U.S., and a German court has fined Siemens 201 million euros for bribes paid abroad.

Debevoise's probe also highlights potential weaknesses in the legal outsourcing model pushed by the Department of Justice and the Securities and Exchange Commission.

[20] "Prosecutors going private for white-collar dollars; Firms vie for skilled lawyers as zealous AGs boost demand; some too pure to play," by Tommy Fernandez, Crain's New York Business, July 18, 2005, pg. 2.

Faced with more cases than staff can handle, the agencies have encouraged companies in recent years to hire outside law firms to conduct in-depth investigations of suspicious activity and then share the information with U.S. prosecutors. In return, cooperative companies hope for more lenient fines and sanctions. [. . .] **Debevoise's white-collar crime practice boasts 11 former federal prosecutors, including Mary Jo White, the former U.S. attorney for the Southern District of New York.** Bruce Yannett, who heads the dozens of Debevoise lawyers investigating Siemens, is a former assistant U.S. attorney for the District of Columbia. The law firm also hired the accounting firm Deloitte & Touche LLP to help chase the money trail."[21] (emphasis added)

WHITE'S SIEMENS WORK SAVED SIEMENS BILLIONS IN PART BECAUSE OF HOW DEBEVOISE WAS PERCEIVED BY THE DEPARTMENT OF JUSTICE

In billing Siemens more than $274 million, it appears that Debevoise's team, led by Mary Jo White, helped Siemens avoid more than $2 billion in potential liability to the US government, as well as retain the right to bid on contracts with the US government.

"Siemens Settles Record-Setting FCPA Case

The German engineering company Siemens made history yesterday, when it agreed to pay fines totaling $1.34 billion to regulators across the world to settle a bribery probe. The $800 million that Siemens will pay to the Department of Justice and the SEC is by far the largest amount ever extracted in a Foreign Corrupt Practices Act case. It could have been worse**. The FCPA Blog writes that Siemens faced up to $2.7 billion in fines under the Federal Sentencing Guidelines and could have been charged with antibribery provisions, which would have kept the company from bidding for U.S. contracts. But U.S. prosecutors asked for only $350 million in criminal fines and didn't pursue antibribery charges.**

Why did prosecutors settle for less? The FCPA Blog points to the sentencing memorandum filed in Washington, D.C., federal district court Friday, in which prosecutors praised the company's cooperation, calling it "exceptional" and "wide-ranging." **Prosecutors gave high marks to Debevoise & Plimpton, which had been hired by Siemens's audit committee to do an internal investigation.** They praised Debevoise for providing "frequent and extensive reports to [the Department of Justice] and the SEC in face-to-face presentations and conference calls that assisted the Department enormously." Prosecutors noted that, according to Siemens's latest estimates, Debevoise lawyers and employees at Deloitte & Touche spent more than 1.5 million billable hours on the investigation. Debevoise has been handsomely compensated. According to The *Wall Street Journal*, Siemens has paid Debevoise more than $274 million."[22] (emphasis added)

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[21] Siemens Internal Review Hits Hurdles --- Costly Yearlong Probe By New York Law Firm Turns Up Little Clarity," By Mike Esterl and David Crawford in Munich and Nathan Koppel in New York, The Wall Street Journal, January 23, 2008 Pg. A18.

[22] http://amlawdaily.typepad.com/amlawdaily/2008/12/the-am-law-l-11.html

3. CHRIS CHRISTIE & BRISTOL-MYERS

While at Debevoise, White represented Bristol-Myers in Christie investigation while Christie was the US Attorney for New Jersey.

CHRISTIE PUBLICLY PROCLAIMED WHITE'S TEAM WAS RESPONSIBLE FOR THE ETHICALLY INCOGRUOUS CASH FROM A CHRISTIE TARGET THAT WHITE REPRESENTED TO CHRISTIE'S ALMA MATER; WHITE NEVER DISAVOWED CHRISTIE

"**Republican gubernatorial nominee Chris Christie said that the ethics chair awarded in his honor to his alma mater, Seton Hall University, was not his idea. The chair was paid for by Bristol-Myers Squibb, which was represented by Mary Jo White, the former U.S. Attorney for the Southern District of New York. "It was the suggestion of counsel for Bristol-Myers Squibb that one of the things they wanted to do to ensure an ethical culture in their company was to endow a chair at the New Jersey law school on ethics," said Christie.**

Cohen then pressed Christie on why it was his alma mater that got the chair, and why not, say, Princeton or Montclair State. Christie shot back that neither of those universities have law schools. Rutgers, which does have one, already has a corporately funded ethics chair. **"What the public needs to know is that it was not my idea, it was not my initiative, and it was something they asked for," he said**."[23] (emphasis added)

BUSH ADMINISTRATION MOVED TO REFORM THEIR OVERSIGHT OVER ALL US ATTORNEYS BECAUSE OF CHRISTIE'S CONDUCT, PARTICULARLY THE BRISTOL-MYERS CASE WHERE WHITE HAD BEEN LEAD ATTORNEY

"The 2007 deal drew criticism from Democratic lawmakers and became national news, leading then-Deputy Attorney General Craig Morford to review these deals at U.S. attorney's offices nationwide. [. . .] Morford concluded that it was time to put up "guardrails" for when and how to appoint monitors in these agreements, as he told department officials then, so nobody could accuse the agency of playing political games. Their concerns about the agreements were underscored by the Seton Hall deal. "People torquing around folks for their favorite charity?" said one former senior Justice Department official, recalling agency leaders' reactions. "We're just not going to do this. It will corrode our institutional credibility. It's way too easy to have that look really bad, really quick."

Morford laid out new rules in a 2008 memo that, among other changes, required that monitor appointments be approved by the deputy attorney general, the agency's second-ranking official, and that monitor candidates be reviewed by committees from U.S. attorney's offices to prevent prosecutors' handpicking their favorite candidates. Seeking to avoid arrangements like the Bristol-Myers Squibb professorship at Christie's law school, the department issued a ban in May 2008 on requiring companies to make

[23] http://politickernj.com/2009/06/christie-addresses-seton-hall-ethics-chair-issue/

special payments to unrelated outside groups as part of their settlements. Payments were allowed only if the recipients were harmed by the alleged crime or would help address the specific problem caused by the conduct.

Although Justice Department officials did not mention Christie in their public pronouncements, it was clear to many at the time that his practices had been a primary factor in prompting the changes. "A handful of New Jersey cases threw the project of monitorships into serious jeopardy," said Brandon Garrett, a law professor at the University of Virginia who has an upcoming book on the practice, called "Too Big to Jail." "They made useful changes to the guidelines because of the New Jersey cases. It was because of how [Christie] was using them."[24] (emphasis added)

[24] http://www.washingtonpost.com/local/chris-christies-long-record-of-pushing-boundaries-sparking-controversy/2014/02/10/50111ed4-8db1-11e3-98ab-fe5228217bd1_story.html

(B) WHITE, DEBEVOISE, AND THE SEC: WHITE'S SUPPORTING ROLE IN THE PEQUOT AFFAIR

In 2005, SEC prosecutor Gary Aguirre was forced out of his position at SEC after aggressively pushing an investigation into law-breaking hedge fund Pequot Capital Management, prompting him to make accusations – which were later vindicated – that senior SEC officials wrongly obstructed the investigation.

Promising and aggressive law enforcement, per a report written by Senate Republican staffers, ran into a serious obstacle in the deep political connections of the attorneys of John Mack, one of the key targets of Aguirre's investigation.

Mary Jo White was connected to several parts of the Pequot Affair. Her status as a powerful attorney that Morgan Stanley chair John Mack could call on appears to have prevented him from being asked to provide testimony in a timely manner. White personally called the SEC enforcement lead, Linda Thomsen, and was able to obtain assurances that Mack would not be implicated in the case – at the same time as Aguirre was unsuccessfully pushing his bosses to allow him to get testimony from Mack. Furthermore, White hired an SEC official partially responsible for Aguirre's unjust firing, naming Paul Berger as a partner in her litigation practice at Debevoise. During the summer that Aguirre was seeking Mack's testimony and White was seeking assurances that Mack would not be required to provide testimony, Berger expressed to Debevoise his interest in employment.

The Pequot Affair epitomizes the power that Wall Street and its lawyers have within the SEC.

1. PEQUOT AFFAIR INTRODUCED

THE SEC WAS FORCED TO HEAVILY COMPENSATE GARY AGUIRRE, AN ATTORNEY PUSHED OUT AFTER WHITE AND OTHERS UNDERMINED HIS PURSUIT OF CORRUPT HEDGE FUND

The *Washington Post* reported in 2010,

"First, they fired him.
Then, they worked to portray him as a "basket case."
Now, they're paying him $755,000 to settle his claims.

The agreement by the Securities and Exchange Commission on Tuesday to settle a wrongful-termination suit by former enforcement lawyer Gary J. Aguirre represents the culmination of years of bitter confrontation that raised questions about whether the agency was ignoring the toughest cases of alleged Wall Street wrongdoing.

Aguirre accused the agency of botching a probe into the prominent hedge fund Pequot Capital Management, saying the SEC was overlooking clear signs he uncovered

that the firm traded in shares of Microsoft based on insider information. Aguirre also accused the agency of firing him after he pushed, unsuccessfully, to interview Morgan Stanley's then chief executive, John Mack, as part of the Pequot probe. Aguirre argued that the agency didn't want to interview the Wall Street giant because of his "political clout."

The agency fired Aguirre for insubordination and closed the case on Pequot. But Aguirre's protests led to two internal investigations by the SEC's inspector general into the handling of the Pequot matter and a scathing Senate report that found that the agency bungled the probe and improperly fired Aguirre. Internal documents show the agency's efforts to discredit Aguirre included discussion of a "basket case" strategy that made him seem like a longtime agency gadfly. The former enforcement lawyer, meanwhile, pursued a private legal claim for wrongful termination.

Recently, the agency changed its tune on two counts.

After new evidence came to light in the Pequot case, the SEC opened a new probe and last month settled insider-trading charges with the firm. Pequot and its chief executive, Arthur Samberg, agreed to pay $28 million to settle SEC charges that the firm traded shares of Microsoft based on insider information.

And Tuesday, the SEC agreed to a settlement, finalized by the Merit Systems Protection Board, to pay Aguirre four years and 10 months of salary and attorney's fees in exchange for Aguirre dismissing his claims. "I think it's fair to the public that the SEC pays for my work over the past four years and ten months, since it generated $28 million to the U.S. Treasury," Aguirre said. "But it's a shame the team I worked with at the SEC did not get to complete the Pequot investigation. The filing of the case in 2005 or 2006, before the financial crisis, would have been exactly what Wall Street elite needed to hear at the perfect moment: The SEC goes after big fish, too."[25]

AGUIRRE'S SUSPICIONS ABOUT PEQUOT WERE VINDICATED AFTER HE HAD BEEN WRONGLY FIRED

"Allegations about insider trading at Pequot -- which had $15 billion under management in 2001 -- date to January 2002, when the New York Stock Exchange flagged several trades as questionable. The SEC intensified an investigation into the hedge fund in 2004, but the agency and federal prosecutors declined to bring any charges and closed the case in late 2006. The case began to attract congressional scrutiny after SEC lawyer Gary Aguirre was fired from the agency in late 2005 and filed a complaint alleging that the Pequot investigation had been botched. In late January 2007, prominent senators called on the SEC to reopen the case and issued an interim version of a 707-page report on the matter. Three months later, Pequot paid $700,000 to a key witness in the case, according to documents that emerged last month in divorce proceedings between the witness and his ex-wife in a Connecticut court. The witness,

[25] http://www.washingtonpost.com/wp-dyn/content/article/2010/06/29/AR2010062904955.html (referencing http://www.washingtonpost.com/wp-dyn/content/article/2008/12/11/AR2008121103726.html on eventual substantiation of inference of insider trading)

David Zilkha, was then paid the same amount exactly one year later and is scheduled to receive a final installment of $700,000 in 2009, the court documents show. [. . .]

Some senators expressed dismay that law enforcement officials failed to discover key evidence in the Pequot case after so many years of scrutiny. "This certainly supports what Mr. Aguirre said before about the possibility of insider information," said Sen. Arlen Specter (Pa.), ranking Republican on the Senate Judiciary Committee and who led the Senate probe. "It raises a serious question in my mind about the adequacy of the investigations conducted heretofore.""[26]

2. MARY JO WHITE & THE PEQUOT AFFAIR:

Mary Jo White played a major contributing role in a scandal that lead to:

- An unjust termination of a public servant, Gary Aguirre, whose aggressive investigation of seeming malfeasance was at odds with the SEC's revolving door culture. Aguirre ultimately received $755,000 to settle his claims that his termination was wrong. Ironically, Aguirre was very much not part of the SEC's revolving door problem.[27]
- A more than 700 page report (including exhibits) from Senate Republicans attacking the role of revolving door and the excessive influence of powerful attorneys like (then at Debevoise) Mary Jo White have over the SEC. The scandal including the wrongful termination of an SEC Attorney who aggressively investigated seeming malfeasance.
- One of Aguirre's supervisors, who contributed to his termination, was shortly thereafter hired as a partner at Debevoise by White (where he remains a securities law practitioner to this day).

As a Senate Republican report concluded,

"**SEC officials were overly deferential to Mack—not because of his politics—but because he was an ''industry captain'' who could hire influential counsel to represent him. Aguirre wrote to Hanson in August 2005, ''You told me that Mack was 'an industry captain,' that he had powerful contacts, that [Former U.S. Attorney] Mary Jo White,** [Former Enforcement Director] Gary Lynch, and others would be representing him, that Mary Jo White could contact a number of powerful individuals, any of whom could call [Enforcement Director] Linda [Thomsen] about the examination.'"[28] (emphasis added)

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[26] http://www.washingtonpost.com/wp-dyn/content/article/2008/12/11/AR2008121103726_pf.html
[27] http://www.sandiegoreader.com/weblogs/news-ticker/2013/jan/17/wall-street-lawyer-to-head-sec/#
[28] "THE FIRING OF AN SEC ATTORNEY AND THE INVESTIGATION OF PEQUOT CAPITAL MANAGEMENT," prepared by the Minority Staff of the Committee on Finance, United States Senate, MAX BAUCUS, Chairman, CHARLES E. GRASSLEY, Ranking Member, and the Committee On The Judiciary, United States Senate
Arlen Specter, Ranking Member, AUGUST 2007, Printed for the use of the Committee on Finance, http://finance.senate.gov/library/prints/download/?id=f9d94204-7602-49f7-8bab-cb932c05310e

WHITE USED HER CONNECTIONS WITH THE SEC TO REASSURE MORGAN STANLEY THAT THE SEC DID NOT INTEND TO CHARGE JOHN MACK, WHOM THEY WERE ABOUT TO REHIRE AS CHAIR

"In 2005, when White was at Debevoise & Plimpton, the board of Morgan Stanley hired her to investigate whether John Mack, who was about to be appointed chairman of the bank, was going to be charged in an S.E.C. insider-trading investigation. **Investigations for corporate clients, meant to protect them from future prosecutions or lawsuits, were a big part of White's practice in those years. White spoke with the head of the S.E.C.'s enforcement division, Linda Thomsen, and was able to report that Mack would not be charged.**"[29] (emphasis added)

3. SENATE REPORT ON THE PEQUOT AFFAIR BLAMES EXCESSIVE INFLUENCE ON SEC OF POWERFUL ATTORNEYS LIKE WHITE

***NEW YORK TIMES* SUMMARIZES SENATE REPORT—SEC ATTORNEY FIRED FOR GETTING IN THE WAY OF MORGAN STANLEY EFFORTS TO HIRE JOHN MACK; MORGAN STANLEY WAS REPRESENTED BY MARY JO WHITE, WHO DID IN FACT CALL SEC ENFORCEMENT DIRECTOR LINDA THOMSEN**

"Pequot Capital came under regulatory scrutiny in 2004 after stock exchange officials had identified 17 to 25 sets of suspicious trades by the hedge fund. Such transactions are routinely turned over to the commission, whose officials then decide whether to investigate them. One series of trades, which made Pequot $18 million, came just ahead of the announcement in 2001 by the General Electric Capital Corporation that it would buy Heller Financial. Advisers on the deal were Credit Suisse, a firm that was wooing Mr. Mack to be its chief executive at the time, and Morgan Stanley.

But after Mr. Aguirre's investigation was under way, the report said, lawyers for both Mr. Samberg and Morgan Stanley's board, which was then considering hiring Mr. Mack as chief executive, received access to high-level S.E.C. enforcement officials — outside the presence of Mr. Aguirre, who was leading the Pequot inquiry. After these contacts, the scope of the Pequot investigation narrowed and Mr. Aguirre was barred from interviewing Mr. Mack.

When Mr. Aguirre complained, the S.E.C. retaliated by firing him, Senate investigators concluded. The report paints a picture of an agency that does not always treat prospective witnesses equally. "By allowing the perception that 'going over the head' of S.E.C. staff attorneys yields results," the report said, "the S.E.C. undermines public confidence in the integrity of its investigations and exacerbates the problems associated with 'regulatory capture.' "

For example, on June 26, 2005, Linda Thomsen, the director of enforcement, spoke by telephone about the Pequot case to Mary Jo White, a lawyer at Debevoise & Plimpton,

[29] http://www.newyorker.com/magazine/2013/11/11/street-cop

who was representing the Morgan Stanley board and was concerned about Mr. Mack's possible involvement, the report said. Ms. Thomsen said she had told Ms. White nothing about the case during the call. But according to Ms. White's account of that conversation, Ms. Thomsen disclosed that subpoenaed e-mail messages showed that there was "smoke there" though "surely not fire.""[30] (emphasis added)

WHITE HIRED IMPLICATED FORMER SEC ATTORNEY TO BE A PARTNER IN HER PRACTICE GROUP AT DEBEVOISE

"Lawyers for the Securities and Exchange Commission have been ordered to search their email files for messages about a former SEC enforcement attorney as part of a congressional investigation into claims the SEC gave favorable treatment to Wall Street investment-banking executive John Mack during an insider-trading probe of Pequot Capital Management Inc. The attorney, Paul Berger, formerly an associate director in the SEC's enforcement division, left the SEC this summer to become a partner at Debevoise & Plimpton LLP, the law firm that conducted its own investigation of Mr. Mack before he was named chairman and chief executive of Morgan Stanley in June 2005.

At the time, SEC lawyers contemplated questioning Mr. Mack in connection with the Pequot insider-trading probe. Debevoise partner Mary Jo White, formerly the U.S. attorney in Manhattan, represented Morgan Stanley's board as it was conducting due diligence on Mr. Mack. SEC enforcement lawyers have been ordered to produce email references to Mr. Berger and employment, seen as a sign of concerns Mr. Berger might have been hired by Debevoise in exchange for favorable treatment of Mr. Mack, according to individuals familiar with the matter. One of these individuals said the implication of a quid pro quo is "ludicrous."[31]

SENATE FINANCE COMMITTEE STAFF ASSEMBLED A POWERFUL CASE SUGGESTING THAT GARY AGUIRRE HAD BEEN MISTREATED BY FUTURE DEBEVOISE PARTNER INTERESTED IN DEBEVOISE JOB WHILE AGUIRRE WAS ACTIVELY INVESTIGATING

White hired Berger to a lucrative partnership at Debevoise despite his mistreatment of whistleblower Gary Aguirre.

"Staff Attorney Gary Aguirre said that his supervisor warned him that it would be difficult to obtain approval for a subpoena of John Mack due to his ''very powerful political connections.'' Aguirre's claim is corroborated by internal SEC emails, including one from his supervisor, Robert Hanson. Hanson also told Aguirre that Mack's counsel would have ''juice,'' meaning they could directly contact the Director or an Associate Director of Enforcement.

Attorneys for Pequot and Morgan Stanley had direct access to the Director and an Associate Director of the SEC's Enforcement Division. In January 2005, Pequot's lead

[30] http://www.nytimes.com/2007/08/04/business/04pequot.html?pagewanted=print
[31] "SEC Lawyers Told to Hand Over Emails in Probe of Pequot Case," By Judith Burns, The Wall Street Journal, October 19, 2006, Pg. A14.

counsel met with the SEC Director of Enforcement Stephen Cutler. Shortly thereafter, SEC managers ordered the case to be narrowed considerably.

In June 2005, Morgan Stanley's Board of Directors hired former U.S. Attorney Mary Jo White to determine whether prospective CEO John Mack had any exposure in the Pequot investigation. White contacted Director of Enforcement Linda Thomsen directly, and other Morgan Stanley officials contacted Associate Director Paul Berger. Soon afterward, SEC managers prohibited the staff from asking John Mack about his communications with Arthur Samberg at Pequot. Seeking John Mack's testimony was a reasonable next step in the investigation. Several SEC staff wished to take Mack's testimony because they believed he: (1) had close ties to Samberg, (2) had potential access to advanced knowledge of the deal, (3) had spoken to Samberg just before Pequot started buying Heller and shorting GE, and (4) was an investor in Pequot funds and was allowed to share in a lucrative direct investment in a start-up company along side Pequot, possibly as a reward for providing inside information.

SEC management delayed Mack's testimony for over a year, until days after the statute of limitations expired. After Aguirre complained about his supervisor's reference to Mack's "political clout," SEC management offered conflicting and shifting explanations for blocking Mack's testimony. Although Paul Berger claimed that the SEC had always intended to take Mack's testimony, Branch Chief Mark Kreitman said that definitive proof that Mack knew about the GE-Heller deal was the "necessary prerequisite" for taking his testimony. The SEC eventually took Mack's testimony only after the Senate Committees began investigating and after Aguirre's allegations became public, even though it had not met Kreitman's prerequisite.

The SEC fired Gary Aguirre after he reported his supervisor's comments about Mack's "political connections," despite positive performance reviews and a merit pay raise.

Just days after Aguirre sent an e-mail to Associate Director Paul Berger detailing his allegations, his supervisors prepared a negative re-evaluation outside the SEC's ordinary performance appraisal process. They prepared a negative re-evaluation of only one other employee. Like Aguirre, that employee had recently sent an e-mail complaining about a similar situation where he believed SEC managers limited an investigation following contact between outside counsel and the Director of Enforcement.

After being contacted by a friend in early September 2005, Associate Director Paul Berger authorized the friend to mention his interest in a job with Debevoise & Plimpton. Although that was the same firm that contacted the SEC for information about John Mack's exposure in the Pequot investigation, Berger did not immediately recuse himself from the Pequot probe.

Berger ultimately left the SEC to join Debevoise & Plimpton. When initially questioned, Berger's answers concerning his employment search were less than forthcoming. The SEC's Office of Inspector General failed to conduct a serious, credible investigation of Aguirre's claims. The OIG did not attempt to contact Aguirre. It merely interviewed his supervisors informally on the telephone, accepted their statements at face-value, and

closed the case without obtaining key evidence. The OIG made no written document requests of Aguirre's supervisors and failed to interview SEC witnesses whom Aguirre had identified in his complaint as likely to corroborate his allegations."[32] (emphasis added)

ATTORNEYS LIKE MARY JO WHITE AT DEBEVOISE ARE THE PROBLEM, PER SENATE REPORT

The Senate Republican report concludes unambiguously that attorneys like White are the problem at the SEC.

"Evidence we reviewed suggests that the reluctance to question Mack represents a much more subtle and pervasive problem than an individual partisan political favor. **SEC officials were overly deferential to Mack—not because of his politics—but because he was an ''industry captain'' who could hire influential counsel to represent him. Aguirre wrote to Hanson in August 2005, ''You told me that Mack was 'an industry captain,' that he had powerful contacts, that [Former U.S. Attorney] Mary Jo White, [Former Enforcement Director] Gary Lynch, and others would be representing him, that Mary Jo White could contact a number of powerful individuals, any of whom could call [Enforcement Director] Linda [Thomsen] about the examination.''**

Hanson's e-mails confirm that he was concerned about direct contacts between senior SEC officials and influential outside counsel. He wrote to Aguirre, ''Mack's counsel will have 'juice' as I described last night—meaning that they will reach out to Paul [Berger] and Linda [Thomsen] (and possibly others).'' Mack's Wall Street prominence and ability to hire prestigious counsel appears to have been the driving force behind treating him with undue deference. However, we found no evidence that Mack himself had a hand in preventing or delaying his testimony."

The SEC has a duty to conduct a vigorous investigation and to treat prospective witnesses equally under the law. The evidence suggests that the bar for taking other testimony in the Pequot investigation was considerably lower than it was for Mack. **If he were a mid-level trader instead of the head of Morgan Stanley, it seems likely that a subpoena would have issued in short order with little or no interference from Aguirre's supervisors. Unfortunately, we have received anecdotal reports that the sort of deference Mack received is not uncommon. It is reportedly driven by a perception within the SEC, which Hanson alluded to in his e-mail, that investigations involving prominent individuals can be slowed or halted by contacts from outsiders with direct access to the most senior SEC officials.**

By allowing the perception that ''going over the head'' of SEC staff attorneys yields results, the SEC undermines public confidence the integrity of its investigations and exacerbates the problems associated with ''regulatory capture.'"[33] (emphasis added)

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[32] "THE FIRING OF AN SEC ATTORNEY AND THE INVESTIGATION OF PEQUOT CAPITAL MANAGEMENT," prepared by the Minority Staff of the Committee on Finance, United States Senate, MAX BAUCUS, Chairman, CHARLES E. GRASSLEY, Ranking Member, and the Committee On The Judiciary, United States Senate
Arlen Specter, Ranking Member, AUGUST 2007, Printed for the use of the Committee on Finance, http://finance.senate.gov/library/prints/download/?id=f9d94204-7602-49f7-8bab-cb932c05310e

WHITE SEEN BY AGUIRRE, SEC PERSONNEL, AND SENATE REPUBLICANS AS THE TYPE OF ATTORNEY WITH "CLOUT" WHO CAN END CAREERS

"On a third occasion, just before he was fired, Aguirre wrote to Hanson alleging that Hanson had spoken of Mack's ''political clout.'' On the morning of August 24, 2005, Aguirre's supervisors began sending e-mails about firing him. **With no knowledge of those e-mails, Aguirre wrote to Hanson later that day, ''before and after the Mack decision, you have told [me] several times that the problem in taking Mack's exam is his political clout, e.g., all the people that Mary Jo White can contact with a phone call.'' Hanson's reply appeared to admit using the phrase** and then, again, attempted to explain what he meant by it:

> Most importantly the political clout I mentioned to you was a reason to keep Paul and possibly Linda in the loop on the testimony. As far as I know politics are never involved in determining whether to take someone's testimony. I've not seen it done at this agency. It does make sense though to have all your ducks in a row before approaching a significant witness like Mack. Hence, the reason to try and figure out a number of things about him before scheduling him up, not least of which is whether he knew about the deal.

Nine months after Aguirre was fired, Paul Berger joined the law firm that contacted the SEC about John Mack on behalf of Morgan Stanley's Board of Directors. Mary Jo White, a former U.S. Attorney for the Southern District of New York and a partner at Debevoise & Plimpton, was one of the attorney's whose ''juice'' Hanson had cited as a concern in taking Mack's testimony. In June 2005, she led the effort by Debevoise to vet John Mack in advance of bringing him back to Morgan Stanley. In the course of the six days during which she represented the Morgan Stanley Board, White contacted Director of Enforcement Linda Thomsen about John Mack and produced e-mails directly to Thomsen. Other representatives of Morgan Stanley also contacted Associate Director Paul Berger directly about the case.

However, when a friend asked Berger about Debevoise & Plimpton a few days after the termination, Berger expressed interest in working for Debevoise. Although we found no evidence of a connection between Berger's role in the Mack controversy and his subsequent employment, Berger apparently: (1) failed to recuse himself from the Pequot investigation in a timely manner, and (2) gave incomplete answers to Senate staff when initially questioned."[34] (emphasis added)

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[33] "THE FIRING OF AN SEC ATTORNEY AND THE INVESTIGATION OF PEQUOT CAPITAL MANAGEMENT," prepared by the Minority Staff of the Committee on Finance, United States Senate, MAX BAUCUS, Chairman, CHARLES E. GRASSLEY, Ranking Member, and the Committee On The Judiciary, United States Senate
Arlen Specter, Ranking Member, AUGUST 2007, Printed for the use of the Committee on Finance, http://finance.senate.gov/library/prints/download/?id=f9d94204-7602-49f7-8bab-cb932c05310e

[34] "THE FIRING OF AN SEC ATTORNEY AND THE INVESTIGATION OF PEQUOT CAPITAL MANAGEMENT," prepared by the Minority Staff of the Committee on Finance, United States Senate, MAX BAUCUS, Chairman, CHARLES E. GRASSLEY, Ranking Member, and the Committee On The Judiciary, United States Senate

4. WHITE MADE A DEBEVOISE PARTNER OF SEC STAFFER IMPLICATED IN THE PEQUOT AFFAIR

BERGER WAS NOT FULLY FORTHCOMING TO SENATE STAFF INVESTIGATING THE AGUIRRE WRONGFUL TERMINATION, PER SENATE REPUBLICANS

"b. The Full Story

Although Berger and the SEC initially implied that he did not start discussing the possibility of employment at Debevoise until months after Aguirre's termination, rumors circulated at the SEC that Berger's search had begun much earlier. Further investigation led to confirmation that others at the SEC were talking about Berger leaving and working for Debevoise long before he recused himself from the Pequot case. One SEC attorney indicated her impression that Berger was going to Debevoise and that she believed that he was looking to leave the Commission as early as the beginning of 2005.

Given this evidence, we continued to press the SEC to do more comprehensive e-mail searches. As early as September 8, 2006, the Committees formally requested records from the SEC relating to Berger's recusal and potential employment with Debevoise.

We then interviewed two witnesses on the record about e-mails discussing speculation regarding Berger's eminent departure long before he recused himself. Finally, on October 31, 2006, the SEC produced a key e-mail, which definitively established that Berger had expressed an interest in employment at Debevoise through an intermediary much earlier. Specifically, he communicated his interest indirectly through a friend to a partner at Debevoise just days after Aguirre was terminated. The e-mail was from Lawrence West, another SEC official who was in employment talks with Debevoise at the time. The e-mail was dated September 8, 2005 and addressed to Paul Berger with the subject line, "Debevoise." The body of the message read, "Mary Jo [White] just called. I mentioned your interest.""

"This raised a number of questions for staff, including why Berger failed to disclose this contact when questioned in July 2006." [….]

"c. Berger's Failure to Mention Pre-Recusal Contacts

During his on-the-record interview, Berger disclosed that in addition to this contact in September 2005 with Debevoise, Goodwin Proctor approached him about employment in fall 2005. When asked about his earlier telephone interview and why he had not disclosed these contacts, Berger claimed alternatively that he either did not remember them or that that he did not consider the September 8 contact to be

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Arlen Specter, Ranking Member, AUGUST 2007, Printed for the use of the Committee on Finance, http://finance.senate.gov/library/prints/download/?id=f9d94204-7602-49f7-8bab-cb932c05310e

reaching out. **We find it difficult to reconcile his initial statement that he began reaching out to firms and they began reaching out to him in January 2006 with the September 8 Debevoise contact and the fall 2005 Goodwin Proctor contact."**[35] (emphasis added)

BERGER AT BEST "CAUSED THE [SENATE] COMMITTEES AND THE SEC TO EXPEND UNNECESSARY TIME AND RESOURCES TO DISCOVER THE FULL STORY"

"However, Berger argued that neither he nor Debevoise had ''reached out'' to one another and that his earlier statements were technically true:

Question: So did you tell [Senate staff] that you began reaching out to firms and they began reaching out to you in January of 2006?
Mr. Berger: I don't remember. That would be true that I didn't start reaching out until January, but I don't remember.
Question: Well, you just told us about that Goodwin Procter reached out——
Mr. Berger: Right. They reached out.
Question: ——prior to January.
Mr. Berger: They reached out to me prior to that, right.
Question: You didn't tell [Senate staff] about that?
Mr. Berger: I don't remember.

Regardless of whether Berger's initial statement was technically true, it caused the Committees and the SEC to expend unnecessary time and resources to discover the full story. We eventually learned from documents what Berger should have volunteered when first asked. In explaining why he was not more forthcoming, Berger claimed that he did not understand the SEC rules governing disclosure of non-public information and implied that the rules might prevent him from talking about his own efforts to seek outside employment:

Question: Do you have any explanation as to why you didn't tell [Senate staff] about those contacts during that call?
Mr. Berger: Well, primarily because I was very concerned about having any discussions without first talking with the SEC and getting authorization to discuss anything.
* * *
You know, I was concerned about having any kind of discussions with someone outside of the SEC at that point, and so I don't know if—you know, why I did or didn't say something.
I mean, I really don't remember what I said.
* * *
Question: So do you think that you were completely honest and forthcoming with [Senate Staff] during that conversation?
Mr. Berger: Yes, I think I was completely honest.

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[35] "THE FIRING OF AN SEC ATTORNEY AND THE INVESTIGATION OF PEQUOT CAPITAL MANAGEMENT," prepared by the Minority Staff of the Committee on Finance, United States Senate, MAX BAUCUS, Chairman, CHARLES E. GRASSLEY, Ranking Member, and the Committee On The Judiciary, United States Senate
Arlen Specter, Ranking Member, AUGUST 2007, Printed for the use of the Committee on Finance, http://finance.senate.gov/library/prints/download/?id=f9d94204-7602-49f7-8bab-cb932c05310e

Question: But not forthcoming?
Mr. Berger: I was concerned about providing any information without authorization from the Commission so that I would not violate any rules. . . .

Commission rules do not restrict former employees from discussing when or under what circumstances they began seeking outside employment.

Perhaps Berger genuinely did not remember in July 2006 that he had authorized a friend to inquire about potential employment with Debevoise in September 2005**. Or, perhaps he wanted to avoid the questions raised by a contact so far in advance of the date on which he recused himself and so close to Gary Aguirre's termination**."[36] (emphasis added)

DEBEVOISE PRESS RELEASE ANNOUNCING BERGER HIRE QUOTED ONLY ONE VOICE, THE CHAIR OF BERGER'S NEW HOME (THE LITIGATION DEPARTMENT), MARY JO WHITE

Debevoise release bragged about Berger's high status within the SEC and emphasized that the DC office in which Berger was to work "provides client services in a variety of areas, including securities litigation and enforcement, corporate governance, white collar criminal defense[…]"

"Debevoise & Plimpton LLP today announced that Paul R. Berger, Associate Director of the Securities and Exchange Commission's Division of Enforcement, will join the firm in June as a litigation partner. Mr. Berger will be resident in the firm's Washington, D.C. office.

In his role as a senior SEC official, Mr. Berger oversaw Commission investigations and enforcement proceedings and served as a principal advisor to the Director of Enforcement and to the Commission on both specific enforcement cases and on enforcement initiatives and policies. He helped establish and currently chairs the Commission's Financial Fraud Task Force and has played a leading role in the Commission's recent focus on the Foreign Corrupt Practices Act enforcement program. He was responsible for numerous cases in the areas of financial fraud, foreign payments, executive compensation, auditor independence, Regulation FD, broker-dealer matters, and insider trading.

Mary Jo White, Chair of Debevoise & Plimpton's Litigation Department, said, "We welcome Paul to the firm and to one of the strongest and most diverse litigation practices in the country. His wealth of experience at the SEC and his leadership on many of the SEC's most significant enforcement cases will be a tremendous asset to our clients. He joins a stellar group of litigators in our Washington office who focus on securities litigation, enforcement and white collar criminal defense matters."[…]

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[36] "THE FIRING OF AN SEC ATTORNEY AND THE INVESTIGATION OF PEQUOT CAPITAL MANAGEMENT," prepared by the Minority Staff of the Committee on Finance, United States Senate, MAX BAUCUS, Chairman, CHARLES E. GRASSLEY, Ranking Member, and the Committee On The Judiciary, United States Senate
Arlen Specter, Ranking Member, AUGUST 2007, Printed for the use of the Committee on Finance, http://finance.senate.gov/library/prints/download/?id=f9d94204-7602-49f7-8bab-cb932c05310e

Debevoise & Plimpton LLP's White Collar Criminal Defense Practice and Securities Litigation and Enforcement Practice are two of the most active practices in its Litigation Department. The practices include representation of clients in the U.S. and abroad involved in criminal and SEC investigations and litigation, and in parallel civil and administrative proceedings. The practices also include representing clients in Congressional, IRS, and other agency investigations, and conducting internal investigations on behalf of companies, boards of directors and board committees. The Department includes two former United States Attorneys and ten former Assistant United States Attorneys.

The Washington, D.C. office of Debevoise & Plimpton LLP provides client services in a variety of areas, including securities litigation and enforcement, corporate governance, white collar criminal defense, regulatory and transactional work for investment companies and other financial institutions, international telecommunications and intellectual property matters."[37] (emphasis added)

PAUL BERGER REMAINS A PARTNER AT DEBEVOISE:
http://www.debevoise.com/paulberger

BERGER'S BIOGRAPHY MAKES CLEAR HIS WORK OVERLAPPED WITH WHITE'S WORK WHEN SHE WAS AT DEBEVOISE, AND THAT HE CONTINUES TO PRACTICE BEFORE THE SEC

"Paul R. Berger is a litigation partner in the Washington, D.C. office, where he focuses his practice on securities litigation, enforcement and white collar criminal defense matters."[38]

BERGER'S OFFICIAL FIRM BIO BOASTS ABOUT HIS PERSUASIVENESS WITH GOVERNMENT ON MATTERS OF "SECURITIES REGULATION"

"Mr. Berger is ranked as a leading lawyer in Securities Regulation: Enforcement and FCPA by Chambers USA (2014), which notes that he is "superb at conducting investigations, processing information, reaching a judgment and preparing a compelling presentation to the government."[39]

[37] http://www.prnewswire.com/news-releases/paul-r-berger-associate-director-of-secs-division-of-enforcement-to-join-debevoise--plimpton-56460497.html
[38] http://www.debevoise.com/paulberger?tab=Biography
[39] http://www.debevoise.com/paulberger?tab=Biography

(C) WHITE'S IDEOLOGY

One of the greatest concerns about a "revolving door" is "regulatory capture," whereby the regulators end up sharing an ideology with the regulated, to the benefit of the private rather than public interest.

Ben Lawksy, a former SDNY prosecutor who had worked for Mary Jo White and had been a fan of hers, argued that White seems likely to have "come to believe pretty deeply" in the worldview of the big banks.

1. HAS WHITE "COME TO BELIEVE PRETTY DEEPLY" IN THE WORLDVIEW OF THE BIG BANKS?

BEN LAWSKY IDENTIFIED FORMER BOSS MARY JO WHITE'S WORLDVIEW AS FAVORING BIG BANKS

"In 2010, White represented Kenneth Lewis, the former chief executive of Bank of America. No charges were filed after an S.E.C. investigation, but Andrew Cuomo, then New York's Attorney General, sued Lewis on fraud charges, accusing him of misstating the shareholders' true cost when the bank rushed to acquire Merrill Lynch. White took the unusual step of issuing a blistering statement, calling the lawsuit "a badly misguided decision without support in the facts or the law." Cuomo's deputy counsel, Ben Lawsky, another Southern District alumnus, was, in effect, being publicly reamed out by his former boss. "That wasn't a pleasant experience for me at the time," Lawsky, who is now New York State's Superintendent of Financial Services, told me. "It's never fun when somebody you revere criticizes the work you're doing. We had a fundamental disagreement. I perceive her as someone who, if the client wants x, and she . . . thinks it's wrong, she'll counsel the client that it's not right and they'll listen. . . . **But when you decide to zealously advocate for a client, and you've been in that case for a long time, my guess is that you come to believe pretty deeply in your view of the world**."[40] (emphasis added)

IN 2005, AS THE FINANCIAL CRISIS APPROACHED, WHITE SAID SHE HER EXPERIENCE IN CORPORATE DEFENSE HAD TAUGHT HER PROSECUTORS SHOULD BE MORE LENIENT TOWARD CORPORATE INVESTIGATIVE TARGETS

"So, I must bear my share of responsibility for how government prosecutors are today using the easy prospect of corporate criminal liability and the Thompson Memorandum to inject themselves to deeply into the business of corporate America and to dictate how companies must respond to government investigation. **But, having now been on the receiving end of these measures in my representations of companies in criminal investigations, I have seen the light and urge that some prosecutors should change or**

[40] http://www.newyorker.com/magazine/2013/11/11/street-cop

at least moderate how they are treating companies in criminal investigations."[41] (emphasis added)

2. Potential Example Of Captured Ideology: Mary Jo White Favored Abolishing Corporate Criminal Liability

2012: ABOLISH CRIMINAL LIABILITY FOR CORPORATIONS ENTIRELY?

"In a 2012 interview with a U.K. publication, **Ms. White suggested that lawmakers should "abolish corporate criminal liability entirely." […]** "Ms. White said in the 2005 interview that criminal indictments are too often fatal to companies and can needlessly harm innocent employees and shareholders. She cited the case of the accounting firm Arthur Andersen, which collapsed in 2002 after it was convicted of obstruction of justice in the investigation of Enron Corp. The SEC isn't responsible for pursuing criminal indictments against corporations, which is the role of the Justice Department. But the agency refers cases where investigators suspect criminal conduct to the Justice Department. Lawmakers could question, given her views, how aggressively Ms. White will pursue corporate wrongdoing and white-collar crime."[42] (emphasis added)

2012, 2005: DOUBTS ABOUT CRIMINAL LIABILITY FOR CORPORATIONS

"**In an interview in 2012 with the law firm career Web site Chambers Associate, Ms. White said she would limit "or abolish corporate criminal liability entirely."** In a 2005 interview with the Corporate Crime Reporter, she said that for publicly traded companies, it "should be the very rare case where an entire entity is subject to a criminal charge."[43] (emphasis added)

WHITE BELIEVES THAT CRIMINAL PROSECUTION OF CORPORATIONS THAT HAVE CONDUCTED CRIMINAL ACTS IS NOT A WORTHWHILE MEANS TO ATTEMPT TO ALTER "CORPORATE CULTURE"

"CCR: You mentioned Larry Thompson's memo. So, let me read to you part of a speech he gave in 2002 to the American Bar Association:

"Large corporations develop their own methods and culture that guide employees thoughts and actions. That culture is a web of attitudes and practices that tends to replicate and perpetuate itself beyond the tenure of any individual manager. That culture may instill respect for the law or breed contempt and malfeasance. The organization itself must be held accountable for the culture and the conduct it

[41] http://www.fcpaprofessor.com/an-informed-and-forceful-critique-of-npas-and-dpas-by-guess-who
[42] "A Market-Cop Image May Be Challenged; SEC Nominee's Views on Corporate Indictments, Whistleblowers May Draw Questions at Her Confirmation Hearings," By Scott Patterson and Jessica Holzer, The Wall Street Journal Online, January 31, 2013.
[43] http://dealbook.nytimes.com/2013/02/04/despite-expectations-corporations-could-face-more-cases-of-criminal-liability

promotes. Without this tool, the public would have no adequate deterrent to corporate criminal conduct because the culture that condoned, or at least acquiesced in, that behavior would be beyond the criminal law's power to correct. Only by prosecuting the corporation itself can we insure systemic reform."

WHITE: I don't think it is an accurate statement. If you are trying to affect future behavior, you are trying to go after a corporate culture that is leading to employees or officers breaking the law. But what it misses is that there are other more appropriate mechanisms to bring about those corporate cultural changes. Exhibit A would be a resolution with the SEC for a public company. The SEC requires not just the payment of a fine or money, but also enhancements in controls, reports to the SEC for a period of time in order to assure that the corporate culture is attended to and altered as appropriate. For a prosecutor to get into the business of changing corporate culture is skating on fairly thin ice."[44]

3. WHITE HAS FREQUENTLY WORRIED ABOUT ANTI-CORPORATE LAW ENFORCEMENT "FRENZY"

Lawsky's concerns of White having become intellectually "captured" by big banks is consistent with White's repeated public worries about a "frenzy" of regulation of the banks.

2002 Q&A: "Q. Should we expect more arrests and prosecutions of corporate executives?

A [MARY JO WHITE]. Given the president's, Congress's and the Department of Justice's strong statements, I would expect to see more. **Arresting executives is a way that the government tries to prove it means what it says in terms of cracking down. The danger, of course -- and it's a significant one -- is overkill, sweeping into the prosecutorial frenzy people who should not be charged**."[45] (emphasis added)

AT DEBEVOISE IN 2002, WHITE USED HER POST-US ATTORNEY STATUS TO ACCUSE BUSH ERA SEC OF "RUNNING AMOK"

"**The government has run amok a bit**," said Mary Jo White, a former U.S. attorney in New York and now a partner at Debevoise & Plimpton. "The government generally is not distinguishing between the good, the bad and the ugly. There's a broad brush and feeding **frenzy**."[46] (emphasis added)

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[44] http://www.corporatecrimereporter.com/maryjowhiteinterview010806.htm
[45] "FIVE QUESTIONS for MARY JO WHITE; Those Very Public Arrests of Executives," By JONATHAN D. GLATER, The New York Times, July 28, 2002, Section 3; Column 2; Money and Business/Financial Desk; Pg. 4.
[46] SEC Says Pitt's Resignation Won't Impede Talks at 12 Firms, by Monique Wise, The Washington Post November 10, 2002 Pg. A13.

2003: "In a Bloomberg Radio interview in 2003, White said she worried about a "**feeding frenzy** of enforcement" after the scandals at Enron Corp. and WorldCom Inc. came to light."[47] (emphasis added)

IN 2006, WHITE CLASSIFIED FEDERAL ANTI-FRAUD ENFORCEMENT AS A "PROSECUTORIAL FRENZY"

"Don't look for any slowdown this year in criminal prosecution of white-collar fraud, a former federal prosecutor said Friday. "**Will the frenzy stop? I'm afraid not**," said Mary Jo White, a former U.S. Attorney for Manhattan, now a partner with the law firm of Debevoise & Plimpton LLP in New York. In remarks to a Northwestern University Law School conference here, White said she sees no abatement in the "prosecutorial frenzy" against corporate fraud despite some recent high-profile setbacks, including the acquittal last June of former HealthSouth Corp. (HLSH) Chief Executive Richard Scrushy. [. . .] **White called the rash of criminal cases against white-collar frauds "an accident waiting to happen" as prosecutors "wanted to get in on the act" as corporate scandals emerged.**"[48] (emphasis added)

IN 2012, WHITE RETURNED TO "FRENZY" FEARS, WARNING PROSECUTORS NOT TO "BOW TO THE FRENZY" TO PROSECUTE FINANCIERS

"In recent years, the SEC has been faulted by lawmakers, judges and investors for failing to bring more cases related to the financial market turmoil that peaked in 2008. White said last year that prosecutors shouldn't allow public anger to influence investigations. "You should be aggressive where there is a crime," she said at a New York University School of Law event in February 2012. Prosecutors must not "fail to distinguish what is actually criminal and what is just mistaken behavior, what is even reckless risk-taking, and **not bow to the frenzy**," she said."[49] (emphasis added)

WHITE ACKNOWLEDGES THAT 90% OF GOVERNMENT WHITE COLLAR PROSECUTIONS PRODUCE CONVICTIONS OR GUILTY PLEAS

Despite her admonitions against white collar criminal enforcement, she acknowledged that many such prosecutions succeed (despite well financed defense work).

"White-collar crime cases aren't a slam-dunk, said White, since complex accounting frauds often are harder to prove than a bank robbery and can bore juries if there isn't "a sexy smoking gun." Nevertheless, she estimates the government has a 90% success rate in obtaining guilty pleas or convictions in white-collar crime cases. Securities and Exchange Commission enforcement-division director Linda Thomsen, who spoke to the same group, said the high success rate shows criminal prosecutors are correctly

[47] http://www.bloomberg.com/news/articles/2013-02-27/obama-s-sec-pick-wary-of-zealous-wall-street-prosecutions

[48] "No Slowdown In White-Collar Fraud Charges Seen In 2006," By Judith Burns, Dow Jones News Service, January 20, 2006. "No Slowdown In White-Collar Fraud Charges Seen In 2006," By Judith Burns, Dow Jones News Service, January 20, 2006.

[49] http://www.bloomberg.com/news/articles/2013-01-24/obama-set-to-name-white-to-sec-cordray-to-lead-consumer-bureau

charging wrongdoers. "You don't get a 90% success rate unless you are carefully evaluating the facts," said Thomsen […]."[50]

4. WHITE EXPRESSED OTHER CONCERNS ABOUT WHITE COLLAR CRIMINAL ENFORCEMENT, INCLUDING WHISTLEBLOWING

In 2004, WHITE WARNED THAT PROSECUTORS MIGHT, DUE TO LACK OF EXPERIENCE, CRIMINALIZE "VIOLATING ACCOUNTING RULES" IN WAKE OF ENRON

"But, Ms. White cautioned, the newfound interest in business investigations also may have led to overreaching by inexperienced prosecutors unschooled in distinguishing between crimes and violations of accounting rules, historically the turf of private litigants and the SEC."[51]

WHITE PUSHED TO MAKE WHISTLEBLOWING LESS LIKELY, PER *WALL STREET JOURNAL*

"Ms. White's views on whistleblowers, an important tool in SEC investigations, are also likely to be questioned at her confirmation hearing. In December 2010, Ms. White, as an attorney with Debevoise, urged the SEC to adopt rules that could end up discouraging whistleblowers from taking their concerns to the agency. The law firm represented six companies, including J.P. Morgan Chase & Co. and General Electric Corp., that pushed for rules that would require employees to report wrongdoing to their employer first before going to the SEC in order to be made eligible for a bounty."[52]

POGO RAISED QUESTIONS ABOUT MARY JO WHITE'S SUPPORT FOR WHISTLEBLOWERS IN LIGHT OF HER WORK AT DEBEVOISE SEEKING TO UNDERMINE SEC SUPPORT FOR WHISTLEBLOWERS

"On at least one issue, it appears White represented major firms that were trying to weaken a potentially important SEC investigative tool.

Dodd-Frank gave the SEC new powers to reward tipsters who blow the whistle on companies or individuals who defraud investors. As the SEC drafted a rule to implement the program, many large companies went on the attack. **In late 2010, the SEC received a letter from General Electric, Google, Honeywell, JPMorgan, Microsoft, and Northrop Grumman. The companies wanted to roll back some of the most important features of the proposed whistleblower program. They suggested that employees should be required to report any suspected fraud internally—in other words, to their employers—**

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[50] "No Slowdown In White-Collar Fraud Charges Seen In 2006," By Judith Burns, Dow Jones News Service, January 20, 2006.

[51] "Executives on Trial: Rooting Out Crime in the Business World --- U.S. Corporate Fraud Task Force Pursues Its Mission Against Corruption Aggressively," By Carrie Johnson, The Wall Street Journal Europe, October 21, 2004 Pg. A12.

[52] "A Market-Cop Image May Be Challenged; SEC Nominee's Views on Corporate Indictments, Whistleblowers May Draw Questions at Her Confirmation Hearings," By Scott Patterson and Jessica Holzer, The Wall Street Journal Online, January 31, 2013.

before they could qualify for an award. Furthermore, they said, the SEC should ensure that "companies are provided with notice of whistleblower complaints about them and with the information from the complaints necessary for the companies to conduct their own inquiries."

For more information, the letter referred the SEC to lawyers at Debevoise—one of whom was Mary Jo White. If White becomes SEC chairman, will she be able to support the whistleblower program that her clients once opposed?"[53] (emphasis added)

[53] http://www.pogo.org/blog/2013/03/20130311-why-congress-should-be-wary-of-mary-jo-white.html

(D) WHITE'S TIME AT SDNY: A FORMER PROSECUTOR'S COMPLICATED RELATIONSHIP TO WHITE COLLAR CRIMINAL ENFORCEMENT

Contrary to the perception that White was unusually tough on white collar crime as US Attorney, her performance in the Citibank/Salinas measure, as well as turf wars with legendary Manhattan District Attorney Robert Morgenthau, indicate a hands off approach. For instance, her stalled Citibank investigation blocked other government agencies from timely investigations of their own.

However, she demonstrated little deference to Morgenthau, who had made his name for zealously pursuing the powerful – indeed, she chaired a 2005 electoral challenge to Morgenthau in part built on the explicit argument that Morgenthau focused too much on white collar criminal prosecutions. That challenge came up way short, despite White's candidate having raised even more money than the incumbent.

1. SALINAS, CITIBANK—WHITE'S SEVERAL YEAR LONG INVESTIGATION SEEMINGLY OBSTRUCTED OTHER INVESTIGATIONS, BUT LED TO NO CHARGES

MARY JO WHITE'S OFFICE FAILED TO PROSECUTE CITIBANK FOR FACILITATING WHAT APPEARS TO HAVE BEEN MONEY-LAUNDERING BY THE BROTHER OF MEXICO'S FORMER PRESIDENT

A lengthy investigation undermined efforts by the GAO to assess Citibank's actions, but did not lead to any actions by White's office.

"**A review of her years in the Southern District also turned up several intriguing cases that Ms. White and her colleagues did not pursue or turned away. All three of these matters involved large and prestigious financial companies headquartered in the United States.**

A big question mark, federal investigators say, still hangs over the decision by Ms. White's office not to prosecute Citibank in the mid- to late 1990s for a possible role in questionable money transfers that benefited Raúl Salinas de Gortari, the brother of the former president of Mexico. Between 1992 and 1994, Mr. Salinas, a consultant to a Mexican antipoverty agency whose annual salary never exceeded $190,000, somehow moved almost $100 million from Citibank accounts in Mexico and New York to Citibank accounts in London and Switzerland.

Banks have a legal obligation to prevent money-laundering, and in July 1996, Ms. White's office opened an investigation into the Salinas transactions. But no prosecution against the bank or any of its officials involved in the Salinas accounts ever came.

A report by the Government Accountability Office in October 1998, as well as a subsequent inquiry by the Senate's Permanent Subcommittee on Investigations, shed light on what can only be described as disturbing practices at Citibank. Its actions, the report said, helped Mr. Salinas transfer money in a way that "effectively disguised the funds' source and destination, thus breaking the funds' paper trail." Citibank made $2 million in fees on the Salinas accounts, the Senate investigators found. **Mr. Salinas was arrested in February 1995 on suspicion of murdering his former brother-in-law, who had been a leading politician in Mexico**. Senate investigators said the bank's "initial reaction to the arrest was not to assist law enforcement but to determine whether the Salinas accounts should be moved to Switzerland to make discovery of the assets and bank records more difficult." Mr. Salinas was convicted of the murder in 1999.

As it prepared its report in 1998, three years after Ms. White's investigation into Citibank began, the G.A.O. requested information from federal prosecutors on the case. The G.A.O. was rebuffed. "Limited by the ongoing Justice Department investigation, we could not determine whether Citibank's actions violated law or regulation," the report said."

The case went nowhere. Ms. White declined to comment. But according to her colleague, who spoke to people who worked on the matter, money-laundering cases are tough to prove and must meet a higher standard than conclusions drawn in government reports."[54] (emphasis added)

GAO REPORT IN OCTOBER 1998

"Mr. Salinas was able to transfer $90 million to $100 million between 1992 and 1994 by using a private banking relationship formed by Citibank New York in 1992. The funds were transferred through Citibank Mexico and Citibank New York to private banking investment accounts in Citibank London and Citibank Switzerland. Beginning in mid-1992, Citibank actions assisted Mr. Salinas with these transfers and effectively disguised the funds' source and destination, thus breaking the funds' paper trail. Citibank

- set up an offshore private investment company named Trocca, to hold Mr. Salinas's assets, through Cititrust (Cayman) and investment accounts in Citibank London and Citibank Switzerland;
- waived bank references for Mr. Salinas and did not prepare a financial profile on him or request a waiver for the profile, as required by then Citibank know your customer policy;
- facilitated Mrs. Salinas's use of another name to initiate fund transfers in Mexico; and
- had funds wired from Citibank Mexico to a Citibank New York concentration account—a business account that commingles funds from various sources—before forwarding them to Trocca's offshore Citibank investment accounts.

[54] http://www.nytimes.com/2013/03/10/business/for-mary-jo-white-few-big-bank-cases-as-a-prosecutor.html RE http://www.gao.gov/products/OSI-99-1

No U.S. documentation identified Mr. Salinas as Trocca's beneficial owner or connected Mr. Salinas to the Trocca funds transferred through Citibank Mexico and Citibank New York. According to Citibank New York's Vice President (VP) for Legal Affairs, whom Citibank designated as its representative to us, Citibank's actions violated only one aspect of the then Citibank know your customer policy:

Citibank should have prepared a financial profile (i.e., a financial background check detailing the source of Mr. Salinas's funds) or waived the requirement before accepting Mr. Salinas as a customer. By investigating his financial background, Citibank could have verified the source of Mr. Salinas's wealth and transferred funds.

Limited by the ongoing Department of Justice investigation, we could not determine whether Citibank's actions violated law or regulation. The Federal Reserve also did not comment on whether Citibank's actions were violations because information available to it at the time we inquired was insufficient for it to make a determination."[55] (emphasis added)

GAO CONCLUDED THAT CITIBANK'S ACTIONS IN SALINAS MATTER WERE INCONSISTENT WITH CLAIMS THEY HAD MADE IN AN EARLIER MONEY LAUNDERING TRIAL

"Further, private banking's know your customer policies are voluntary and not governed by law or regulation. A comparison of Citibank actions and Citibank testimony in the 1994 money laundering trial shows that the two were inconsistent concerning due diligence and know your customer practices in private banking. For example, Citibank's testimony implied a stricter adherence to due diligence than actually occurred during the Salinas transactions."[56]

2. BARIDIS CASE, ROBERT MORGENTHAU, AND QUESTIONS OF OVERLAPPING JURISDICTION AND A VARYING APPROACH TO WHITE COLLAR CRIME

WHITE WAS MORE AGGRESSIVE PURSUING JURISDICTION THAN PROSECUTING MORGAN STANLEY

In a case involving Morgan Stanley, White aggressively (and based on legal premise rejected by a New York State Supreme Court Judge) pushed aside legendary Manhattan District Attorney Robert Morgenthau, leading to less aggressive prosecution.

"ANOTHER matter that raised questions about Ms. White's approach during that same period centered on insider trading by friends of Marisa Baridis, a Morgan Stanley compliance employee. In the fall of 1997, a New York State grand jury indicted Ms. Baridis on charges of grand larceny, securities fraud and accepting a bribe. According to the indictment, prosecutors in the Manhattan district attorney's office, then led by

[55] http://www.gao.gov/assets/230/226687.pdf
[56] http://www.gao.gov/assets/230/226687.pdf

Robert M. Morgenthau, had a tape of Ms. Baridis admitting she leaked confidential information about companies to brokers at other firms who traded on it.

Immediately after the state indictment of Ms. Baridis, Ms. White's office started investigating her. Weeks later, Ms. White's office reached a deal with Ms. Baridis, who pleaded guilty to federal conspiracy and securities fraud. **The plea effectively halted the state's case against Ms. Baridis because the rules of double jeopardy bar a person from being prosecuted twice for the same crime.**

In an interview at the time, Ms. White explained her actions by saying: "Securities frauds affecting the national and international markets should be charged federally." A New York State Supreme Court disagreed, ruling that state prosecutors could pursue insider trading cases.

After intervening in the case, though, prosecutors in Ms. White's office pursued only one other person who had been tipped off by Ms. Baridis. Ms. Baridis was sentenced to two years' probation. Mr. Morgenthau's office prosecuted 10 people involved in the trading who worked at other companies. Now in private practice, Mr. Morgenthau declined to comment on the case."[57] (emphasis added)

THE BARIDIS CASE WAS PART OF A HEIGHTENED BATTLE BETWEEN MANHATTAN DA AND WHITE'S SDNY OFFICE; MANHATTAN DA MORGENTHAU WAS FAMOUSLY COMMITTED TO AGGRESSIVE WHITE COLLAR CRIMINAL INVESTIGATIONS

"For now, at least, they are increasingly on competing tracks, with a growing number of separate grand jury investigations into similar or related allegations of wrongdoing involving stocks and brokerage firms. Both state and Federal authorities are looking into the activities of several New York-based firms, including D. H. Blair, A. R. Baron and Bear Stearns, according to prosecutors and defense lawyers. Such parallel investigations, in which the same people are testifying before both state and Federal grand juries, probably mean that the squabbling between Mr. Morgenthau and Ms. White is far from over.

The intense competition is unusual, but not unprecedented, in New York. [. . .] But those squabbles were kept largely behind the scenes and rarely made their way into open court. **That changed four weeks ago, when Ms. White's office swooped in and accepted guilty pleas to Federal insider-trading charges from Ms. Baridis, 29, who worked at Morgan Stanley, Dean Witter, Discover & Company and before that at Smith Barney, a unit of the Travelers Group. Ms. Baridis had earlier been indicted on state charges of grand larceny, securities fraud, possession of stolen property, accepting a bribe and scheming to defraud.** Two brokers accused as co-conspirators with Ms. Baridis had already entered guilty pleas in state court. Mr. Morgenthau's investigators say that they caught Ms. Baridis on video and audio tapes admitting that she leaked confidential

[57] http://www.nytimes.com/2013/03/10/business/for-mary-jo-white-few-big-bank-cases-as-a-prosecutor.html

information about companies to people who she knew would use it to make money in the market."[58]

WHITE'S CONDUCT IN BARIDIS CASE SAID BY *NEW YORK TIMES* TO HAVE "ENRAGED" MORGENTHAU

"Her range of interests and lack of regard for bruising others has angered some: the Manhattan district attorney, Robert M. Morgenthau, was enraged when Ms. White used federal law in 1997 to trump a securities fraud case his office had filed first."[59]

UNLIKE MORGENTHAU, IT SEEMS AS IF WHITE HAD BACKED DOWN WHEN A CASE IMPLICATED BEAR STEARNS

The Baridis case emerged from the Baron case, which Moregenthau successfully pursued after White had passed on it.

"Finally, there is the fascinating matter of A.R. Baron, a small but abusive penny-stock brokerage that failed in 1996, leaving investors with $75 million in losses. An investigation by the New York district attorney into the firm led him to Bear Stearns, then a prominent investment bank that had provided crucial financing to keep A.R. Baron operating even though it was aware of the smaller firm's many improprieties. In 1997, Mr. Morgenthau's office obtained indictments against A.R. Baron and 13 individuals; all pleaded guilty to enterprise corruption and grand larceny except one executive, who was found guilty at trial. A related civil case brought by the S.E.C. generated $38.5 million in restitution and fines paid by Bear Stearns in a settlement in 1999.

Ms. White had been offered case but turned it down. The colleague said she declined to say why. But the legal view at that time was that proving criminal liability of a firm like Bear Stearns for enabling fraud at a smaller firm was not easy. Still, taking such cases — and making them — makes prosecutorial reputations."[60] (emphasis added)

WHITE PASSED ON BARON CASE, WHICH LED TO BARIDIS AND IMPLICATED BEAR STEARNS

"Despite all the current jousting, the two prosecutors have not always fought for business. **Ms. White's office last year passed up the chance to investigate A. R. Baron & Company, which is now defunct. Baron and 10 top executives pleaded guilty this year to securities fraud charges brought by state prosecutors, and it was in the course of pursuing that case that Mr. Morgenthau's office got on the trail of Ms. Baridis.** Ms. White declined to go into the history of the Baron case, but she applauded much of the work done by Mr. Morgenthau's office.

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[58] http://www.nytimes.com/1997/12/26/business/sparring-for-pieces-wall-street-action-rivalry-erupts-over-who-will-wage-war.html?pagewanted=print

[59] "As Bush Replaces Prosecutors, a Formidable One Stays On," By BENJAMIN WEISER, The New York Times, June 18, 2001, Section B; Column 2; Metropolitan Desk; Pg. 1.

[60] http://www.nytimes.com/2013/03/10/business/for-mary-jo-white-few-big-bank-cases-as-a-prosecutor.html

Securities regulators in Washington had taken the Baron case to New York, hoping to get a criminal investigation started. Their entreaties, and those of some of the victims of Baron's frauds, got an enthusiastic response at Mr. Morgenthau's office, which found evidence that Baron traded customer accounts without authorization and manipulated stock prices. That investigation also brought extra expertise to the office. "We had two or three of our examiners assigned there, from our Chicago office, for many months," said Barry Goldsmith, executive vice president for enforcement at the regulatory arm of the National Association of Securities Dealers.

Baron, along with several other recently established New York brokerage firms that specialize in small, speculative stocks, was largely led and staffed by brokers from D. H. Blair, a link that has helped to stimulate investigators' interest in that firm's current and former employees. A spokesman for the firm declined to comment.

Baron had also carried out its trades through the Bear Stearns Companies, and retained and re-established that link even as its regulatory problems grew. That has led both state and Federal investigators to focus on the Bear Stearns clearing business, run by Richard Harriton, a senior managing director. The business, which facilitates trades for other firms, is one of the largest such operations on Wall Street."[61] (emphasis added)

MORGENTHAU'S OFFICE WAS BUILT FOR CASES LIKE BARIDIS

"State prosecutors are also continuing to pursue their charges against Ms. Baridis. As part of her plea agreement with Federal authorities, she waived her double-jeopardy rights on the condition that she would not face any additional jail time in a state prosecution. She also said in court that she would cooperate with state investigators. But on Tuesday, her lawyer, Paul Shechtman, said he would file a motion in state court seeking to dismiss the charges there because state prosecutors would not agree to be bound by the Federal sentence. **While Ms. Baridis faces as much as 15 years in prison under the Federal charges, she could wind up with much less time, or even no jail at all, because of her cooperation with Ms. White's office. (Mr. Morgenthau's office has said that Ms. Baridis would face stiffer penalties if convicted of the state charges.)**

With his strong interest in white-collar crime, Mr. Morgenthau has been carefully preparing for this latest round of financial investigations. Using their share of the money collected as fines -- particularly from his office's investigation, beginning in 1989, of the Bank of Credit and Commerce International, a now-defunct international bank that New York investigators revealed was riddled with fraud -- Mr. Morgenthau has gradually built up his ability to investigate white-collar cases. He has recruited experienced staff members, including David U. Gourevitch from the Securities and Exchange Commission and Carolyn Pelling from the law firm of Richards Spears Kibbe & Orbe. The office now has 74 assistant district attorneys in its investigative division, which handles white-collar

[61] http://www.nytimes.com/1997/12/26/business/sparring-for-pieces-wall-street-action-rivalry-erupts-over-who-will-wage-war.html?pagewanted=print

cases, compared with 45 in 1988, according to Barbara Thompson, a spokeswoman for the office."[62]

MORGENTHAU IS A LEGEND FOR INTEGRITY; HIS HIGHLY REGARDED SERVICE INSPIRED LAW & ORDER

"**Over the years, Morgenthau racked up the high-profile prosecutions, trying celebrities, mobsters, terrorists, money launderers, socialites and Wall Street scoundrels with equal zeal.** The 500-plus lawyers in the Manhattan DA's office handle about 100,000 cases each year. **It has been called the nation's premier prosecutor's office and is the model for the television series "Law and Order." The show's first fictional district attorney, Adam Schiff, played for 10 years by the actor Steven Hill, was said to be based on Morgenthau.** The real-life Morgenthau also had a cameo role in the show as a judge."[63] (emphasis added)

MORGENTHAU'S LEGEND WAS IN PART DUE TO HIS COMMITMENT TO ENFORCING WHITE COLLAR CRIMINAL LAW

"The world's most important financial markets and institutions are in Manhattan and, on a quiet day, about $4 trillion passes through Manhattan, Morgenthau estimates. Therefore, financial crimes that originate here can have global reach. He made white-collar crime a priority, allowing the office to reach into some deep pockets. Soon, ill-gotten gains were seized and rolling into the state and city coffers."[64]

ABA JOURNAL: "**Morgenthau became known for applying the same zeal and toughness to financial crimes as to violent crimes—justice for rich and poor alike, some of his former assistants like to say. Critics say he put too much emphasis on white-collar crime, but violent crime plummeted in New York City during his tenure**. […] Morgenthau is credited with developing white-collar crime prosecution as we know it after longtime friend President John F. Kennedy appointed him U.S. attorney for the Southern District of New York in 1962. [. . .] "But our position was that fraud trumps accounting rules," he says. Morgenthau had anticipated the Enron scandal. He created the first financial securities fraud bureau in a U.S. attorney's office. The Simon case sent notice to professionals. "But they didn't listen," he says. Before he left, his office brought cases against big banks, but others are now left to investigate the opaque financial deals that led to the 2008 financial meltdown."[65] (emphasis added)

3. Mary Jo White Maintained Rivalry With Morgenthau, Served as Campaign Chair for Opponent in Failed Effort to Unseat Him

[62] http://www.nytimes.com/1997/12/26/business/sparring-for-pieces-wall-street-action-rivalry-erupts-over-who-will-wage-war.html?pagewanted=print
[63] http://www.cnn.com/2009/CRIME/12/31/morgenthau.district.attorney/
[64] http://www.cnn.com/2009/CRIME/12/31/morgenthau.district.attorney/
[65] http://www.abajournal.com/magazine/article/the_boss

WHITE TRIED AND FAILED TO DEPOSE MORGENTHAU, SERVING AS CAMPAIGN CHAIR FOR HIS CHALLENGER IN 2005

"Playing Thelma to Snyder's Louise is U.S. Attorney Mary Jo White, who was always arm-wrestling Morgenthau for cases (Snyder argues there needs to be more cooperation between the two offices) and is now Snyder's campaign chair."[66]

SNYDER, WHOSE CAMPAIGN WHITE CHAIRED, ARGUED THAT MORGENTHAU HAD BEEN TOO FOCUSED ON WHITE COLLAR CRIME

"Cases against the well-off and the well-defended have been touchstones of Morgenthau's career—and Morgenthau has set his assistant district attorneys to work on the same kinds of cases he prosecuted as U.S. Attorney. This focus on white-collar crime—a traditional province of federal prosecutors—is at the heart of Snyder's critique. "Morgenthau has said that he spends almost half his budget on white-collar cases, and that's too much," Snyder said when we talked at her campaign headquarters, a mostly empty loft-style office near the entrance to the Holland Tunnel."[67]

SNYDER ALSO EMPLOYED DOUG SCHOEN AS A SENIOR STRATEGIST;[68] SCHOEN REGULARLY ATTACKS DEMS, POLLS FOR CHAMBER OF COMMERCE

Schoen polls for organizations like the Chamber of Commerce and attacks Democrats and progressive causes,[69] as summed up by Washington Monthly's Steve Benen:

"Pollster Doug Schoen is the quintessential "Fox News Democrat." He loosely identifies himself as a Dem, but as someone who's actively hostile towards Dems and the party's agenda, Schoen is really only popular as a personality in GOP media. Fox News gets to tout its "balance" by inviting him on the air — Republicans who hate Democrats are joined by Democrats who hate Democrats. With that in mind, Schoen has an op-ed in the *Wall Street Journal* today, urging President Obama to steer clear of the "radical" Occupy Wall Street protesters for his own good. (Given that Schoen has already urged the president to drop out of the 2012 race, one might question whether the Fox News Democrat has Obama's best interest at heart.)"[70]

WHITE'S CANDIDATE LOST BY A "BIG MARGIN"

As a *New York Times* article headlined, "Morgenthau Wins Race by Big Margin," noted, "With 100 percent of election districts reporting, Mr. Morgenthau had 59 percent of the vote. Mr. Morgenthau's name recognition among voters and support from labor groups

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[66] http://nymag.com/nymetro/news/politics/newyork/features/1870/index2.html
[67] http://www.newyorker.com/magazine/2005/05/16/the-upstart
[68] http://nymag.com/nymetro/news/politics/newyork/features/1870/
[69] http://mediamatters.org/blog/2010/10/15/fox-news-hosts-schoen-to-defend-chamber-of-comm/172020 , http://mediamatters.org/blog/2011/10/18/polling-and-concern-trolling-occupy-wall-street/181391 AND http://www.salon.com/2011/11/21/fake_democratic_pollsters_have_stupid_idea/
[70] http://www.washingtonmonthly.com/political-animal/2011_10/doug_schoen_isnt_helping_his_r032892.php

and Democratic clubs helped blunt the calls for change from his rival, Leslie Crocker Snyder, in her many television advertisements. Mr. Morgenthau, 86, emphasized his office's strong record and his longtime opposition to the death penalty."[71]

WHITE'S CANDIDATE HAD MORE MONEY AND MORE ESTABLISHMENT BACKING THAN MORGENTHU, YET LOST BY A "DECISIVE" MARGIN

"She raised some $2 million in 2005 to Morgenthau's $1.3 million, but suffered a decisive 59%-41% primary loss. It was Morgenthau's first significant challenge since 1985 and most of the Democratic establishment lined up behind him - even after The *New York Times* endorsed her. Mayor Bloomberg's pollster Doug Schoen is working with Crocker Snyder but is not yet on her payroll."[72]

[71] http://www.nytimes.com/2005/09/14/nyregion/metrocampaigns/morgenthau-wins-race-by-big-margin.html

[72] http://www.nydailynews.com/news/ex-judge-morgenthau-rematch-article-1.332225 ; **SNYDER FAILED AGAIN IN 2009:** Snyder was also defeated in 2009, losing to Morgenthau's chosen successor: "The selection of Mr. Vance, 55, represents something of a validation of the Morgenthau era. Mr. Morgenthau has repeatedly said over the past several months that Mr. Vance will be most able to run the office the way he has." http://www.nytimes.com/2009/09/16/nyregion/16election.html

(E) MARY JO WHITE'S APPROACH TO HIRING AT DEBEVOISE & THE SEC

White's track record of hiring indicates a preference for people who rotate between Wall Street and government jobs, a characteristic she not only embodies, but is proud of. This report is not comprehensive in denoting all of the SEC hires White has made from Wall Street, nor all of the hires who have already revolved back to Wall Street positions from White's SEC.

1. WHITE VALUES HER OWN REVOLVING DOOR EXPERIENCES, AND AT DEBEVOISE, SOUGHT TO REWARD FORMER SEC ATTORNEYS WHO HAD NOT BEEN TOO "AGGRESSIVE" TOWARD WALL STREET

MARY JO WHITE EMBRACES REVOLVING DOOR EXPLCITILY, CITING HER SENIOR POSITION ON NASDAQ BOARD OF DIRECTORS AS A QUALIFICATION FOR HER SEC POSITION:

"After I completed my term as U.S. Attorney in 2002, and returned to private practice, I was elected to the NASDAQ board. I was appointed to the Executive and Audit Committees and chaired the Policy Committee. [. . .] Board experience can also provide critical preparation for other professional positions. Clearly, the experience helped me when I was advising boards as a lawyer. **And the knowledge I gained from being engaged in the details of complex order types at NASDAQ and the broader knowledge of market structure issues I gained better equipped me some years later to serve as Chair of the SEC**."[73] (emphasis added)

MARY JO WHITE ONLY HIRED PAUL BERGER AFTER BEING ASSURED THAT HE WAS NOT TOO AGGRESSIVE TOWARD THE CORPORATE SECTOR WHILE DOING PUBLIC SERVICE AS A SECURITIES LAW ENFORCER

White's description of her concerns about Paul Berger (see above, Section B) underscore the perils of the revolving door: White wanted to ensure that the prospective Debevoise partner, a senior SEC official implicated in Gary Aguirre's wrongful termination suit, had not been too "aggressive" toward Wall Street during his public service enforcing the law. In describing her hiring process at Debevoise, White revealed the constraint on law enforcement amidst a revolving door culture – prosecutors seeking a lucrative spin along the revolving door to the private sector needed to ensure that they did not excessively antagonize Wall Street.

"The first involve White's deposition about this case, which she gave in February 2007, as part of the SEC Inspector General's investigation. In this deposition, White is asked to recount the process by which Berger came to work at D&P. There are several striking exchanges, in which she gives highly revealing answers.

[73] http://www.sec.gov/News/Speech/Detail/Speech/1370542961053#.VRwomPnYPZ4

First, White describes the results of her informal queries about Berger as a hire candidate. "I got some feedback," she says, "that Paul Berger was considered very aggressive by the defense bar, the defense enforcement bar." White is saying that lawyers who represent Wall Street banks think of Berger as being kind of a hard-ass. She is immediately asked if it is considered a good thing for an SEC official to be "aggressive":

Q: When you say that Berger was considered to be very aggressive, was that a positive thing for you?
A: It was an issue to explore.

Later, she is again asked about this "aggressiveness" question, and her answers provide outstanding insight into the thinking of Wall Street's hired legal guns – what White describes as "the defense enforcement bar." In this exchange, White is essentially saying that she had to weigh how much Berger's negative reputation for "aggressiveness" among her little community of bought-off banker lawyers might hurt her firm.

Q: During your process of performing due diligence on Paul Berger, did you explore what you had heard earlier about him being very aggressive?
A: Yes.
Q: What did you learn about that?
A: That some people thought he was very aggressive. That was an issue; we really did talk to a number of people about.
Q: Did they expand on that as to why or how they thought he was aggressive?
A: I think and as a former prosecutor, sometimes people refer to me as Attila the Hun. I understand how people can get a reputation sometimes. **We were trying to obviously figure out whether this was something beyond, you always have a spectrum on the aggressiveness scale for government types and was this an issue that was beyond real commitment to the job and the mission and bringing cases, which is a positive thing in the government, to a point. Or was it a broader issue that could leave resentment in the business community or in the legal community that would hamper his ability to function well in the private sector?'**

It's certainly strange that White has to qualify the idea that bringing cases is a positive thing in a government official – that bringing cases is a "positive thing . . . to a point." **Can anyone imagine the future head of the DEA saying something like, "For a prosecutor, bringing drug cases is a positive, to a point?"**

One would think that even a defense firm would value a regulator with an aggressive rep -- after all, a tough lawyer is a tough lawyer. What this testimony shows is that what is valued instead in this rarefied community of millionaire lawyers (where one can easily "get a reputation") is a talent for political calculation, and a sensitivity to what may or may not hamper one's ability to "function in the private sector." What they're looking for is someone who, when sitting in the regulator's seat, does the job, but doesn't live the job, if you catch the distinction.

Given that White has already made this move from enforcement to defense once, and given that we now know that she knows that firms like hers value regulators who can avoid creating "resentment in the business community" and retain their ability to "function in the private sector," I think it's safe to expect that White's SEC will take very good care to bring cases, but only "to a point."[74] (emphasis added)

2. CHIEF COUNSEL ROBERT RICE, DEUTSCHE BANK, AND WHISTLEBLOWER PROTECTIONS

White's hiring of a Chief Counsel implicated in a whistleblower case before the SEC sent a problematic message. At the same time, Robert Rice's career serves as an object lesson in the nature of the revolving door, as individuals repeatedly move up in the private sector by successive stints in public employment. Rice, who had previously (and troublingly) been at Deutsche Bank, would end up following his stint as White's Chief Counsel at the SEC with a partnership at Ropes & Gray, where his hiring would be trumpeted by the firm as providing its client the benefit of his experience from his time at the SEC.

RICE HIRE BY WHITE FITS WITHIN THE SEC'S "REVOLVING DOOR" HIRING PATTERNS

"There has long been a revolving door between the SEC and Wall Street, with many current and former financial regulators moving from prosecuting and watching Wall Street banks to defending them at white-collar law firms or working for the firms themselves and vice versa. Rice actually worked with his new boss, SEC chairman Mary Jo White, at the U.S. Attorney's Office in New York's Southern District. White herself worked with several banks and financial executives in her time at Debevoise & Plimpton, including JPMorgan Chase, UBS, and former Bank of America CEO Kenneth Lewis.

Rice is the third Deutsche Bank executive since 2001 to hook up with the SEC for a stint. Robert Khuzami was Deutsche Bank's general counsel in the Americas before moving to becoming the SEC's head of enforcement in 2009. He resigned earlier this year before White was nominated as SEC chair in late January. Richard Walker, Deutsche Bank's current general counsel, worked as the SEC's director of enforcement from 1998 to 2001."[75]

FORTUNE MAGAZINE PUBLISHED PIECE WARNING AGAINST THE HIRING OF RICE

"While her staff fiddles over whether to address Senate report allegations of false J.P. Morgan London Whale disclosures, SEC Chair Mary Jo White has an immediate staffing matter that should command her attention. White set her first big test in motion last

[74] http://www.rollingstone.com/politics/news/new-sec-chief-mary-jo-white-thinks-the-government-should-bring-cases-to-a-point-20130130#ixzz3WGQ1QwjF
[75] http://www.buzzfeed.com/matthewzeitlin/sec-chairs-new-chief-counsel-entangled-in-whistleblower-case#.lywvAbVK6

week when she chose Robert Rice as SEC counsel. The appointment is more than your typical revolving-door case. Rather, it could wind up having a serious chilling effect on the SEC's whistleblower program.

Rice comes to the SEC from Deutsche Bank , which he joined in 2004 as "head of regulatory and internal investigations for the Americas. Since 2010, he has been responsible for developing and executing global legal strategies in governance, litigation, and regulation for all aspects of the bank's businesses," according to an SEC press release.

But the SEC press release failed to disclose a complaint over an improper firing of an SEC whistleblower that names Rice as a respondent and "describes several meetings" with the newly appointed SEC counsel, the Financial Times reported on June 9. The fired whistleblower had alerted Deutsche executives to his concerns about a purported massive accounting fraud at the bank. The allegations by the whistleblower of an up to $12 billion understatement of losses at Deutsche are serious enough that Germany's central bank is looking into them. Some argue that Deutsche might have failed had the extent of its losses (like Lehman's) been known at the time.

Eric Ben-Artzi, the whistleblower who filed the complaint, is not alone. According to the Financial Times, two other Deutsche employees unbeknownst to Ben-Artzi actually beat him to the punch in blowing the whistle on the bank. **Did White not know about the complaint against Rice (lack of due diligence) or was this a lapse of transparency (not good for those enforcing disclosure laws)?**

The SEC requires companies "to include information about significant pending lawsuits or other legal proceedings" in their annual filings. And the SEC mandates that company proxies include 10 years' worth of information on "legal actions involving a company's executive officers, directors, and nominees for director." In its 2009 final proxy disclosure rules, the SEC wrote that such information "is important to an evaluation of an individual's competence and character to serve as a public company official."

So what about full and open transparency concerning legal matters involving appointed public officials, particularly at the SEC? According to the Financial Times, Rice led Deutsche's internal investigation into the alleged multibillion-dollar misstatement. While Deutsche asserts that it did nothing wrong, the SEC is supposedly still looking into the accounting fraud allegations. Because of this, Rice and the SEC would seem to be in a bit of a conflict. The SEC requires company proxies to disclose certain potential conflicts of interest and related party transactions by directors. Shouldn't Rice's involvement on this significant Deutsche matter been openly disclosed?"[76] (emphasis added)

POGO WORRIED WHEN RICE WAS HIRED

[76] http://fortune.com/2013/06/12/sec-chair-mary-jo-whites-first-big-test/

"The article raises the concern that because Rice was involved in this potential improper firing of a whistleblower, hiring him to be the counsel for the SEC might have a chilling effect on future whistleblowers."[77]

WILLIAM COHAN WAS ALSO WORRIED ABOUT THE RICE HIRING IN 2013

Cohan, formerly an investment banker at Lazard Freres & Co., Merrill Lynch, and JPMorgan Chase, wrote:

"To test the SEC's new resolve, keep an eye on the civil case involving Eric Ben-Artzi, a quantitative analyst turned whistle-blower at Deutsche Bank AG in New York. The bank is being investigated by White's enforcement division. If she pursues Deutsche Bank for misrepresenting its financial health before and during the financial crisis, as Ben-Artzi alleges, then we'll know her zeal is for real. If the case languishes or isn't prosecuted aggressively, then we'll know that the SEC remains in the thrall of Wall Street. [. . .] Complicating matters further is that one of the people at Deutsche Bank who repeatedly tried to persuade Ben-Artzi to drop his concerns was Robert Rice, the head of governance, litigation and regulation in the Americas. Rice is now White's chief counsel at the SEC."[78]

FUTURE MARY JO WHITE CHIEF COUNSEL WAS PLACED VERY CLOSE TO THE FIRING OF A SOON TO BE (SEEMINGLY) VINDICATED WHISTLEBLOWER

"Eric Ben-Artzi, like another whistleblower featured here (Peter Sivere), didn't talk to the press until his employer, Deutsche Bank, had fired him. "I never wanted or expected to be a whistleblower," he says. "I reported internally first – and extensively, in accordance with bank policies and procedures. But as the problem was not acknowledged or corrected, I felt compelled to inform the law enforcement authorities. Unfortunately my family and I are paying a heavy price for doing the right thing." Ben-Artzi alleged that, during the financial crisis, Deutsche Bank had overstated the value of more than $130bn of collateralised debt obligations or CDOs (securities containing different pieces of debt) on its balance sheet, to the tune of $12bn. If true, this would mean that Deutsche Bank had misstated its financial performance and its officers had signed off its financial statements illegally. The Financial Times first reported many of Ben-Artzi's concerns about Deutsche Bank in December 2012. [….]

Ben-Artzi decided to raise his concerns with his Deutsche Bank colleagues. "I didn't like the answers I was getting," he says. […] In March 2011, after two months of growing frustration, Ben-Artzi made two phone calls. The first was to the SEC, which eventually initiated a still-pending investigation. Four days later he called the internal Deutsche Bank Hotline, which is intended to allow employees to report wrongdoing or concerns without reprisal. "There are credit derivatives trades that I think are overvalued," Ben-Artzi told the hotline, while declining its offer of anonymity. He says he went to the SEC first because "there were sufficient red flags" and he also wanted to give the SEC "a tip" in case he was fired after going to the hotline. He thought that "I could be

[77] http://www.pogo.org/blog/2013/06/first-big-test-for-new-sec-chari.html
[78] http://www.bloombergview.com/articles/2013-11-25/is-the-sec-s-new-enforcement-zeal-for-real-

terminated instantly, without any access to any information, so then essentially there would be no protection for me."

A few days after his hotline report, Ben-Artzi says he was summoned to a meeting with Robert Rice, the bank's head of governance, litigation and regulation in the Americas. Rice told him he thought the SEC was already aware of the internal disagreement about how to value the credit-derivatives portfolio and that an outside attorney, William Johnson, a partner at the Wall Street law firm Fried Frank Shriver & Harris, was investigating it. Ben-Artzi would be asked to meet him. [. . .]

For weeks afterwards, Ben-Artzi heard nothing. Frustrated, he informed his boss that he had also discussed the situation with the SEC. Within an hour, he says, Rice called him back to his office. "It's not my place to discourage you from going to the SEC, of course, but have you gone?" Ben-Artzi says Rice asked him. Ben-Artzi told Rice he did not want to discuss it as he was worried about retribution. Rice arranged for Ben-Artzi to meet with senior managers in New York, including top risk management executives. [. . .]

Between late June and mid-October, Ben-Artzi took extended paternity leave. He worked remotely and gave serious thought to moving to Berlin to work in a related part of the bank. Then on November 7 2011 he was summoned to a conference room at Deutsche Bank in Wall Street and fired. He says he was told his job had been moved to Berlin and he could not have it. He was also told his termination was not related to his job performance. Ben-Artzi did not believe it. "I can't see any other reason other than retaliation," he says. At the end of the meeting, he was escorted out of the building. He received about $30,000 in severance pay and would have received more had he signed away his right to sue the bank. But he did not sign. [. . .]

While awaiting the outcome of his legal battles, Ben-Artzi started looking for a new job. At first, he tried to find a position on Wall Street. He had a few interviews but they went nowhere. He and his family then moved to Seattle, where Ben-Artzi hoped to find a job in the technology sector. But Seattle didn't work out either. Recently, he was hired to teach finance and applied mathematics at Ohio State University."[79] (emphasis added)

WHILE WHISTLEBLOWER STRUGGLED TO REBUILD HIS CAREER, DEUTSCHE BANK SETTLEMENT WAS REACHED FOLLOWING RICE'S DEPARTURE FROM THE SEC

"The investigation was aided by at least two whistle-blower actions filed by former Deutsche employees who outlined some bank activity and how it was misvaluing the derivatives in its credit correlation book. News of the investigation and the involvement of one whistle-blower was first reported by Reuters in 2011. The whistle-blowers, Matthew Simpson and Eric Ben-Artzi, and their lawyers have argued that the misvaluing of the derivatives portfolio masked the true financial health of Deutsche in the midst of the financial crisis. Mr. Ben-Artzi has argued that the flawed valuations effectively helped the bank hide billions of dollars in losses and avoid the need for a potential bailout from the German government.

[79] http://whistleblower.org/multimedia/financial-times-william-d-cohan-wall-street-whistleblowers#sthash.991YCdi5.dpuf

It is not clear whether Mr. Simpson and Mr. Ben-Artzi, both of whom provided documents to regulators and were interviewed several times by investigators, will be entitled to collect a portion of the settlement money. "Six years ago, Mr. Simpson, at great personal risk, acted only as his conscience would allow him," said Mr. Simpson's lawyer, Christopher Chang. "He is now vindicated." Jordan Thomas, a lawyer for Mr. Ben-Artzi, said, "I am very pleased that the S.E.C. has confirmed Dr. Ben-Artzi's serious allegations and vindicated him personally."

The settlement did not claim any wrongdoing by individuals at the bank. In late 2013, the Federal Reserve Bank of New York, in a move potentially related to the misvaluation of the derivatives portfolio, sent a letter to Deutsche, directing it to fix longstanding deficiencies in its financial reporting procedures. At the time, Mr. Thomas said the Fed's findings were consistent with some of the accusations raised by his client. The bank in its statement said that since the financial crisis, it "has enhanced policies, procedures and internal controls regarding the valuation of illiquid assets.""[80]

DEUTSCHE BANK AG PAID $55 MILLION TO SETTLE THE CASE ONE WEEK BEFORE RICE JOINED ROPES & GRAY

WSJ: "Deutsche Bank AG has agreed to pay $55 million to the U.S. Securities and Exchange Commission to settle allegations it hid paper losses of more than $1.5 billion during the financial crisis that began in 2008. **The giant German lender said it didn't admit or deny the allegations and that no charges were brought against individuals in the matter**. "The SEC acknowledged the bank's cooperation throughout the investigation," Deutsche Bank said in a statement Tuesday.

The SEC said in a separate statement Deutsche Bank has underestimated certain risks by between $1.5 billion and $3.3 billion." Like its main rivals, Deutsche Bank has been entangled in several regulatory investigations into past misbehavior. The lender in April paid a record $2.5 billion fine to U.S. and U.K. authorities for having tried to manipulate interbank interest rates, known as Libor.

Investors at the bank's shareholder meeting last week lashed out at senior management, and co-Chief Executive Anshu Jain in particular, for the many lawsuits and slow progress resolving them.

The allegations behind the settlement announced Tuesday date to late 2008 and early 2009. A whistleblower at the time alleged the bank didn't update the market value of certain credit default swap transactions, known as super senior trades. The whistleblower alleged the bank thereby masked mounting losses as the market value sank.

Deutsche Bank said Tuesday that it didn't update the transactions' market value because it believed at the time that there was no reliable method for measuring them

[80] http://www.nytimes.com/2015/05/27/business/dealbook/sec-says-deutsche-bank-misvalued-derivatives.html

amid illiquid market conditions during the crisis. The bank said it had since enhanced policies, procedures and internal controls regarding the valuation of illiquid assets. [...] The *Wall Street Journal* reported last year that an examination by the Federal Reserve Bank of New York found that the bank's giant U.S. operations suffer from a litany of serious regulatory-reporting problems that the lender had known about for years but not fixed, citing Fed documents it has reviewed. Deutsche Bank is trying to move beyond its period of scandals and alleged malfeasance. It unveiled a new strategy in late April designed to boost its profitability and share price."[81] (emphasis added)

DEUTSCHE BANK HAS SEEMINGLY DONE WELL AT THE SEC UNDER WHITE, DESPITE "APPALLING CONDUCT" AND "RECIDIVIST" STATUS

SEC Commissioner Stein's "Dissenting Statement in the Matter of Deutsche Bank AG, Regarding WKSI" illuminates the recurring nature of Deutsche Bank's problematic conduct and light sanctioning.

"I respectfully dissent from the Commission's Order ("Order"), approved on May 1, 2015, by a majority of the Commission. The Order grants Deutsche Bank AG a waiver from ineligible issuer status triggered by a criminal conviction of its subsidiary, DB Group Services (UK) Ltd. (collectively with Deutsche Bank AG, "Deutsche Bank"), for manipulating the London Interbank Offered Rate ("LIBOR"), a global financial benchmark. This waiver will allow Deutsche Bank to maintain its well-known seasoned issuer ("WKSI") status, which would have been automatically revoked as a result of its criminal misconduct absent a Commission waiver.

Created by the Commission as part of the Securities Offering Reforms of 2005, WKSI status is available "for the most widely followed issuers representing the most significant amount of capital raised and traded in the United States." This status confers on the largest companies certain advantages over smaller companies. WKSIs are granted nearly instant access to investors through the capital markets. WKSIs enjoy greater flexibility in their public communications and a streamlined registration process with less oversight than smaller businesses. For example, unlike smaller businesses, the WKSI issuer does not have to wait for the Division of Corporation Finance to review and declare a registration statement effective prior to selling financial products to investors. WKSI companies also enjoy a number of other privileges related to the payment of fees. […]

Deutsche Bank's illegal conduct involved nearly a decade of lying, cheating, and stealing. This criminal conduct was pervasive and widespread, involving dozens of employees from Deutsche Bank offices including New York, Frankfurt, Tokyo, and London. Deutsche Bank's traders engaged in a brazen scheme to defraud Deutsche Bank's counterparties and the worldwide financial marketplace by secretly manipulating LIBOR. The conduct is appalling. It was a complete criminal fraud upon the worldwide marketplace. […]

It is unclear to me how this waiver can be granted, for reasons substantially similar to those I outlined in my dissent regarding another institution involved in LIBOR

[81] http://www.wsj.com/articles/deutsche-bank-agrees-to-pay-55-million-to-sec-1432651289

manipulation. **Among other factors, the egregious criminal nature of the conduct and the duration of the manipulation (almost a decade) weigh heavily in my mind when considering this waiver. Additionally, Deutsche Bank is a recidivist, and its past conduct undermines its current promise of future good conduct. Since 2004, Deutsche Bank has, among other violations, a criminal admission of wrongdoing connected to promoting tax shelters, a settlement involving misleading investors about auction rate securities, and a violation against its investment bank for improperly asserting influence over research analysts. Deutsche Bank requested and was previously granted a WKSI waiver in 2007 and 2009.**

This criminal scheme involving LIBOR manipulation was designed to inflate profits, and it was effective. It created the impression that Deutsche Bank was more creditworthy and profitable than it actually was. Accordingly, the conduct affected its financial results and disclosures. Because LIBOR plays such an important role in the worldwide economy, manipulation of it goes to the heart of many aspects of Deutsche Bank's disclosures. Interest rates represented to clients and the public also were clearly false. Based on this conduct, I do not find any basis to support the assertion that Deutsche Bank's culture of compliance is dependable, or that its future disclosures will be accurate and reliable.

Finally, Deutsche Bank has not shown good cause for receiving a waiver from automatic disqualification, in this, its third WKSI waiver request in eight years. I am unable to conclude that Deutsche Bank's culture of compliance and the reliability and accuracy of its future disclosures establishes good cause for a waiver. As the U.S. Commodity Futures Trading Commission's ("CFTC") Director of Enforcement noted: "Deutsche Bank's culture allowed such egregious and pervasive misconduct to thrive.""[82] (emphasis added)

RICE HIRING COMPARED TO BERGER & WHITE'S ROLE IN THE PEQUOT AFFAIR

"**The appointment of Rice smells a lot like another hire involving Mary Jo White, this one at her previous employer, law firm Debevoise and Plimpton. That case involved Paul Berger who, according to a timeline produced by the Senate minority staff of the Committee on Finance and the Committee of the Judiciary, was instrumental in the firing of Gary Aguirre, an SEC investigator who later filed for wrongful dismissal and won a record award. Aguirre had wanted to interview soon-to-be Morgan Stanley MS 0.55% CEO John Mack about whether Mack had passed an insider tip to hedge fund Pequot. (White was acting as counsel to Morgan Stanley's board.) After Aguirre's firing, the SEC dropped any plans to interview Mack, Berger indicated interest in working at Debevoise to White through a colleague, and he landed a spot at the firm, where he still works today**.

The episode sent a signal that SEC investigators should not step out of line. Given White's involvement in that matter, Rice's appointment is all the more concerning. The Government Accountability Project (GAP) supports Ben-Artzi's wrongful dismissal claim.

[82] http://www.sec.gov/news/statement/dissenting-statement-deutsche-bank-ag-wksi.html referencing 2014's http://www.sec.gov/News/PublicStmt/Detail/PublicStmt/1370541670244

In a press release in December, GAP legal director Tom Devine said, "Dr. Ben-Artzi was a model corporate citizen who discovered SEC violations that could incur serious liability, and stuck his neck out internally to warn bank management. Deutsche Bank's response was to personally harass him, and fire him as soon as it pinned down what he knew. The retaliation was crude, and not camouflaged. Quite clearly, the point was to scare other would-be whistleblowers into silence. The lesson learned is that working within Deutsche Bank's corporate compliance and reporting system is an act of professional suicide."

Perhaps White deliberately wanted to send a bold warning to future SEC whistleblowers by choosing Rice. But if this is not her intention, will she correct the mistake or flunk her first big test?"[83] (emphasis added)

RICE WAS A KEY FIGURE AT WHITE'S SEC, PER MARY JO WHITE

Rice, involved in what at first blush appears quite possible to have been the firing of a whistleblower whose claims have been vindicated by the SEC, was valued by White while at the SEC.

"Chair White named Mr. Rice her Chief Counsel in June 2013. In that position, Mr. Rice has been a senior legal and policy advisor to Chair White and has provided advice and counsel on a wide range of regulatory matters across the Commission's divisions and offices, including enforcement actions and strategy; oversight and examinations of broker-dealers, investment advisers, self-regulatory organizations and credit rating agencies; and cross-border regulatory matters. "Bob is one of the brightest and finest professionals I have ever known," said SEC Chair Mary Jo White. "I relied on his impeccable judgment on a variety of important enforcement and regulatory issues, and I am very grateful to him for his service to the agency and to me."[84]

RICE LEFT SEC FOR CORPORATE LAW FIRM AT WHICH HE WOULD REPRESENT CLIENTS IN THE SECURITIES FIELD

"Robert E. Rice, a veteran regulatory enforcement lawyer and former federal prosecutor who most recently served as Chief Counsel to U.S. Securities and Exchange Commission Chair Mary Jo White, has joined Ropes & Gray today as a partner in the firm's business and securities litigation practice in New York.

With almost twenty-five years of experience in government and the private sector handing regulatory enforcement matters and criminal investigations and prosecutions, **Mr. Rice's wealth of experience and unique background will immediately benefit the firm's clients in the financial services industry and other highly regulated areas**. In his most recent role as a senior legal and policy advisor to SEC Chair White, Mr. Rice provided advice and counsel on a broad range of regulatory matters throughout the SEC's divisions and offices, focusing on enforcement actions, policy and strategy; examinations of broker-dealers, credit rating agencies, investment advisers, self-

[83] http://fortune.com/2013/06/12/sec-chair-mary-jo-whites-first-big-test/
[84] http://www.sec.gov/news/pressrelease/2015-17.html#.VMvVUy7eM81

regulatory organizations and other SEC registrants; and cross-border coordination with other regulatory agencies.

Before joining the SEC, Mr. Rice was a Managing Director and held a senior in-house counsel position at a global financial institution. In that role, Mr. Rice managed complex domestic and global regulatory enforcement, criminal and litigation matters arising from the financial institution's business lines, including asset management, broker-dealer services, corporate and investment banking services, and proprietary trading. [. . .] **At Ropes & Gray, Mr. Rice will concentrate his practice on the representation of corporate entities, and their officers and directors, in connection with regulatory investigations and enforcement proceedings by federal and state regulatory agencies. Mr. Rice will also guide corporate clients, and officers and directors, in white-collar criminal investigations and prosecutions by the U.S. Department of Justice and state and local law enforcement agencies, as well as parallel civil litigation actions and internal investigations**."[85] (emphasis added)

ROPES & GRAY EXPRESSLY BOASTED OF ITS EXTENSIVE GOVERNMENTAL TIES WHEN HIRING WHITE'S FORMER CHIEF COUNSEL RICE

"**Mr. Rice joins other recent additions to Ropes & Gray's litigation and government enforcement practices in just the past year, both in New York and globally, adding to the roster of 23 former prosecutors and SEC enforcement attorneys at the firm**. In early 2015, Ryan Rohlfsen joined as partner the firm's Chicago office from the Department of Justice's Criminal Division, Fraud Section, where he was recognized as a leading attorney for criminal and civil actions, and part of an elite group of federal prosecutors responsible for enforcement of the U.S. Foreign Corrupt Practices Act.

In 2014, Marc Berger became a partner in the firm's New York government enforcement practice, arriving from the U.S. Attorney's Office for the Southern District of New York, where he served as Chief of the Securities and Commodities Fraud Task Force. In addition, Patrick Sinclair, a former prosecutor for the U.S. Attorney's Office for the Eastern District of New York, joined the firm's government enforcement practice in Hong Kong in late 2014. **Ropes & Gray enforcement attorneys have counseled international financial services firms in SEC, CFTC, and various SRO investigations, as well as in federal criminal and state attorneys general investigations. The firm's partners have also defended executive officers in multibillion-dollar securities fraud and derivative class actions across the country**."[86] (emphasis added)

3. GOLDMAN SACHS' ANDREW DONOHUE NOW WHITE'S NEW REVOLVING DOOR CHIEF OF STAFF

[85] https://www.ropesgray.com/news-and-insights/news/2015/June/Robert-Rice-Former-Chief-Counsel-to-SEC-Chair-Joins-Ropes-Gray.aspx#sthash.CcBz1XRp.dpuf
[86] https://www.ropesgray.com/news-and-insights/news/2015/June/Robert-Rice-Former-Chief-Counsel-to-SEC-Chair-Joins-Ropes-Gray.aspx#sthash.CcBz1XRp.dpuf

SEC RELEASE: "The Securities and Exchange Commission today announced that Andrew J. "Buddy" Donohue has been named the agency's chief of staff. Mr. Donohue will replace Lona Nallengara who will leave the agency in June. **As chief of staff, Mr. Donohue will be a senior adviser to the Chair on all policy, management, and regulatory issues.**

"I am thrilled that Buddy will be returning to the SEC to provide his extensive knowledge and expertise to the agency," said SEC Chair Mary Jo White. "Buddy is a seasoned professional whose previous SEC and private sector experience will be invaluable in advancing all aspects of the agency's mission. His deep knowledge of asset management will be especially useful as the Commission advances its rulemaking agenda for addressing potential risks in asset management and considers a uniform fiduciary standard.""[87] (emphasis added)

MARY JO WHITE'S ALREADY SERIOUS RECUSAL ISSUES WERE WORSENED BY HIRING SENIOR EXECUTIVE FROM GOLDMAN SACHS AND MORGAN LEWIS & BOCKIUS LLP

White, who brought troubling conflict of issues with her to the SEC,[88] did not publicly provide any indication of potential recusals, or lack thereof, by Donohue. **Indeed, the press release announcing Donohue's hiring suggested, to the contrary, that he "will be a senior adviser to the Chair on all policy, management, and regulatory issues."**[89] (emphasis added)

WHITE'S NEW CHIEF OF STAFF STATED THAT "INDUSTRY" EXPERIENCE NECESSARY TO HAVE SUFFICIENT "EXPERTISE AND JUDGMENT" TO WORK AT SENIOR RANKS OF SEC

Donohue is not only an example of the revolving door in regulation, he is a proponent of the revolving door. The following comment concerns the person who succeeded him from Donohue's previous SEC stint, and who had been hired from Goldman Sachs, where he eventually ended up, Donohue said:

"Rominger reported $57.5 million in income from New York-based Goldman Sachs in a financial disclosure form covering 2010 and 2011. […] "**It's incredibly important for the commission to have the access to the expertise and judgment that comes from having been in the industry," Donohue, Rominger's predecessor, said in an interview."**[90] (emphasis added)

DONOHUE'S SUCCESSOR ROMINGER UNDERSCORED THE REVOLVING DOOR BETWEEN GOLDMAN SACHS AND THE SEC THAT DONOHUE IS CONTINUING

From Forbes contributor Neil Weinberg:

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[87] http://www.sec.gov/news/pressrelease/2015-103.html
[88] http://www.bloombergview.com/articles/2013-02-14/mary-jo-white-s-latest-conflict-of-interest
[89] http://www.sec.gov/news/pressrelease/2015-103.html
[90] http://www.bloomberg.com/news/articles/2011-08-31/ex-goldman-exec-joined-sec-after-earning-more-than-57-million

"The Securities and Exchange Commission put out press release earlier this month that would be comical if it weren't such a disheartening sign of the status quo. The commission announced it has appointed a new director of its Division of Investment Management–a unit that in the SEC's own words "protects investors and promotes capital formation through oversight and regulation of the nation's multi-trillion dollar investment management industry."

The new director: Eileen Rominger. Her old job: global chief investment officer for Goldman Sachs Asset Management. Yes, I know. Goldman Sachs Asset Management is an investor. But when I think of investors in need of protection, I think of little guys who need protecting from the likes of Wall Street giants such as Goldman Sachs. Goldman, after all, is the investment bank that last year paid $550 million to settle charges it was screwing its clients. In the SEC's typical namby-pamby way, it let Goldman off without admitting or denying wrongdoing. The investment bank did concede its marketing materials were "incomplete" in that they failed to disclose that Paulson & Co. played a role in structuring subprime securities against which Goldman encouraged its investor-clients to bet."[91]

NEW WHITE CHIEF OF STAFF DONOHUE'S PREVIOUS SEC STINT WAS NOT A RECORD OF ACCOMPLISHMENT

Donohue was hired by former conservative Republican Chris Cox for his first stint at SEC: "Chairman Christopher Cox announced today that leading Wall Street fund lawyer Andrew "Buddy" Donohue will join the Securities and Exchange Commission as its next Director of the Division of Investment Management."[92]

DONOHUE WAS WELCOMED TO THE SEC BY THE INDUSTRY HE WAS TO REGULATE

"Securities and Exchange Commission Chairman Christopher Cox on Monday named Merrill Lynch attorney Andrew Donohue to head the agency's division of investment management, which oversees mutual-fund regulation. [. . .] Paul Schott Stevens, director of the Investment Company Institute, the big mutual-fund-industry trade group, said Donohue's experience makes him "extraordinarily well-equipped" to take the job."[93]

DONOHUE SPEARHEADED A FAILED INITIATIVE TO REGULATE EXCESSIVE MUTUAL FUND COSTS

"He was head of the division of investment management at the SEC from May 2006 to November 2010. In his role, he spearheaded an initiative to restrict how much mutual fund companies could charge in marketing and servicing fees, known as 12b-1 fees. The proposal was met with vehement opposition and ultimately never passed."[94]

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[91] http://www.forbes.com/sites/neilweinberg/2011/01/31/the-sec-looking-out-for-wall-street/
[92] http://www.sec.gov/news/press/2006/2006-52.htm
[93] http://www.marketwatch.com/story/merrill-lawyer-donohue-named-sec-fund-chief
[94] http://www.reuters.com/article/2012/10/08/us-goldman-donohue-idUSBRE8970OA20121008

MANY HAD SPECULATED THAT DONOHUE WAS SEEKING TO CASH IN WHEN HE LEFT SEC IN THE MIDDLE OF SEVERAL PROJECTS IN 2010

"Observers speculate that Mr. Donohue, 59, is at an age where he can change the direction of his career at least one more time. Prior to the SEC, he was general counsel at Merrill Lynch Investment Managers, overseeing legal and regulatory compliance for more than $500 billion in assets, including mutual funds, fixed-income funds, hedge funds, private equities and managed futures."[95]

DONOHUE LEFT THE SEC IN 2010 WITH MAJOR PROJECTS INCOMPLETE

"Not only is Mr. Donohue leaving with the final form of the 12(b)-1 rule still unresolved, but he is also stepping aside from the massive agenda handed to his division by the Dodd-Frank financial-reform legislation, which requires the SEC to promulgate 95 rules and conduct 17 studies over the next year or so."[96]

DONOHUE DEPARTURE WAS SEEN AS A "SURPRISE"

"The SEC's announcement last week that its top official overseeing the mutual fund industry will leave in November caught many by surprise."[97]

IN 2012, IT WAS REVEALED THAT A KEY INQUIRY HEADED BY DONOHUE DURING HIS 2006-10 TENURE WAS STILL NOT COMPLETE TWO YEARS AFTER HIS FOUR YEARS AT SEC ENDED

"Donohue also led the SEC's examination of how ETFs use derivatives, which is ongoing."[98]

UPON 2010 DEPARTURE FROM SEC, CORPORATE LAW FIRM PARTNERS PRAISED DONOHUE FOR NOT "BEING OVER-REGULATORY"

"As head of the Securities and Exchange Commission's Division of Investment Management for the past four years, Andrew J. "Buddy" Donohue helped shape many of the rules and regulations governing the $10.5 trillion fund industry, including proposals aimed at discouraging so-called pay-to-play practices and boosting investor-oriented disclosures related to target date funds and investment adviser brochures. "He had a personal agenda that largely appears to be where he wants it to be," said Barry Barbash, a former director of the SEC's Division of Investment Management and now a partner at Wilkie Farr & Gallagher LLP. **That said, Mr. Donohue pursued that agenda "without being over-regulatory,"** said Christopher Robertson, a partner at Seyfarth Shaw LLP and a former senior counsel at the SEC's enforcement division. "He navigated a lot

[95] http://www.investmentnews.com/article/20100822/REG/308229976/sec-watchers-surprised-by-timing-of-donohues-exit
[96] http://www.investmentnews.com/article/20100822/REG/308229976/sec-watchers-surprised-by-timing-of-donohues-exit
[97] http://www.investmentnews.com/article/20100822/REG/308229976/sec-watchers-surprised-by-timing-of-donohues-exit
[98] http://www.reuters.com/article/2012/10/08/us-goldman-donohue-idUSBRE8970OA20121008

of input from a lot of different sources about what the rules look like and how they're implemented," he said."[99] (emphasis added)

NOT DEEMED AN AGGRESSIVE REGULATOR, DONOHUE WAS CONSIDERED "CAUTIOUS" AND "MEASURED"

"The commissioners and staff at the Securities and Exchange Commission have been working around the clock, looking for ways to refine and improve regulations in the aftermath of one of the worst recessions in history, but this important work takes a delicate touch. Changes to one area could have unexpected ramifications to other areas, and every move must be planned with care and consideration. The SEC's Andrew J. "Buddy" Donohue, director of the division of investment management, is known for his cautious, measured approach."[100]

Donohue was also openly critical of SEC reforms while at Morgan Lewis.[101]

4. Other White Hirings Further Ensnared the SEC in a Thicket of Interest Conflicts

WHITE'S PICK FOR ENFORCEMENT CO-DIRECTOR, ANDREW CERESNEY, WAS A FELLOW FORMER DEBEVOISE PARTNER WHO SHARED MANY OF HER TROUBLING CONFLICTS OF INTEREST

SEC RELEASE: The Securities and Exchange Commission today announced that Acting Director George Canellos and former federal prosecutor Andrew Ceresney have been named Co-Directors of the Division of Enforcement. […] **Most recently, Mr. Ceresney served as a partner in the law firm of Debevoise & Plimpton LLP, where he focused on representing entities and individuals in white collar criminal and SEC investigations, complex civil litigation and internal corporate investigations.** "George and Andrew are two of the best lawyers and finest people I know. They are a perfect combination to lead the talented Enforcement Division professionals who protect investors and keep our markets safe and vibrant," said Mary Jo White, SEC Chair. […]

Mr. Ceresney said, "I am truly humbled to be joining the SEC's Enforcement Division with its rich history and deeply committed and talented people. I am excited to be charged with implementing Chairman White's mandate of bold and unrelenting enforcement and thrilled to be teaming again with George, an immensely talented lawyer and close friend." **The Enforcement Division is the agency's largest unit, with more than 1,200 investigators, accountants, trial attorneys and other professionals**. In recent years the division has achieved remarkable success prosecuting financial crisis cases, insider

[99] http://www.investmentnews.com/article/20100822/REG/308229976/sec-watchers-surprised-by-timing-of-donohues-exit
[100] http://www.mmexecutive.com/issues/2009_33/-196696-1.html
[101] http://www.morganlewis.com/news/economic-situation-complicates-reform-of-money-market-funds-sec-official-says-isecurities-regulation-law-reporti?p=1

trading and other violations, while returning billions to harmed investors."[102] (emphasis added)

A report by the Project on Government Oversight highlighted the troubling overlap of conflicts of interest between White and Ceresney:

"Some of the potential conflicts that have ensnared White have also tied the hands of Andrew Ceresney, the SEC's enforcement chief. **Like White, Ceresney was an attorney at Debevoise & Plimpton and represented some of the same powerhouse Wall Street firms, including Credit Suisse, JPMorgan, and UBS, according to a financial disclosure statement posted by The *Wall Street Journal*.** The *Journal* has reported that both White and Ceresney remained on the sidelines in 2013 when the SEC voted to settle with JPMorgan for its alleged failure to prevent massive trading losses in the "London whale" case. POGO asked the SEC for more information on White's recusals in cases involving Simpson Thacher, but the agency declined to comment.[103] (emphasis added)

5. White Facilitated Michael Mukasey's Revolving Door Moves Between Government and Wall Street

White's relationship with George W. Bush Attorney General Michael Mukasey helps illustrate the cozy nature of elite relationships within the revolving door between government and Wall Street.

WHITE PROVIDED POLITICAL COVER TO MUKASEY APPOINTMENT AS ATTORNEY GENERAL BY GEORGE W BUSH

"He'll be a superb attorney general," says Mary Jo White, a lawyer at Debevoise & Plimpton LLP who served as U.S. attorney in the Southern District from 1993 to 2002. "I think he will hit the ground running and be an instant shot in the arm for the morale and reputation" of the Justice Department."[104]

WHITE TESTIFIED ON BEHALF OF MUKASEY'S NOMINATION TO BECOME ATTORNEY GENERAL

"MS. WHITE: Thank you very much, Senator Cardin. It's my privilege to speak on behalf of the nomination of Judge Michael B. Mukasey. He is a man of great intellect and integrity with an unswerving commitment to the rule of law. He is independent, fair-minded and has a wealth of relevant experience from his years of service on the bench, in the private and as an assistant United States attorney in the Southern District of New York. **There could not be, in my view, a stronger or better nominee to head the Department of Justice**, particularly at this time, when the department is in need of a

[102] http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171514832
[103] http://www.pogo.org/blog/2015/01/20150114-sec-chair-got-waiver-to-oversee-wall-street-law-firm.html
[104] "Mukasey Leanings Hard to Decode --- Independent Streak Evident in Rulings; Backed Patriot Act," by Evan Perez and Peter Lattman, The Wall Street Journal, September 18, 2007, Pg. A4.

strong and respected leader as our country faces one of the greatest challenges in its history -- to secure the nation against the threat from al Qaeda and related terrorist networks, and to do so consistently with the rule of law and our principles as a free and democratic society. [. . .] **I am equally confident that Judge Mukasey will be a superb leader of the department in carrying out its many other important responsibilities and priorities that are vital to the rights, safety and well-being of the American people.**"[105] (emphasis added)

MUKASEY WENT ON TO JOIN WHITE'S PRACTICE AT DEBEVOISE

"Debevoise & Plimpton LLP today announced that Michael B. Mukasey, who has served as Attorney General of the United States and Chief Judge of the United States District Court for the Southern District of New York, will join the firm's Litigation Department in New York as a partner, effective later this month. [. . .] **At Debevoise, Judge Mukasey will join Mary Jo White, the former U.S. Attorney for the Southern District of New York and Chair of the firm's Litigation Department**, and Lord Goldsmith QC, who served for six years as the United Kingdom's Attorney General and is the firm's European Chair of Litigation. **Judge Mukasey will focus his practice primarily on internal corporate and other investigations, independent board reviews, corporate governance, monitorships and other similar representations.**"[106] (emphasis added)

MUKASEY AND WHITE WORKED WITH USA PATRIOT ACT ARCHITECT ON BEHALF OF NEWS CORP AFTER MUKASEY USED GOVERNMENT CREDIBILITY TO TRY TO LIMIT THE FOREIGN CORRUPT PRACTICES ACT

"News Corp.'s independent directors hired the law firm Debevoise & Plimpton LLP, according to Mary Jo White, a partner at the firm and the former U.S. attorney in New York. Michael Mukasey, who served as U.S. attorney general under George W. Bush, will join White in representing directors, Suzanne Elio, a spokeswoman for the firm, said today. "Debevoise & Plimpton has been retained to advise Viet Dinh in his supervision of the Management and Standards Committee on behalf of the independent members of the board," Elio said in an e-mail. She declined to comment further**. Dinh, who runs a small law firm in Washington that specializes in damage control, and venture capital executive Tom Perkins are leading the efforts of independent directors, who hold nine of 16 board seats. Dinh, also a professor at Georgetown University and the chief architect of the USA Patriot Act, represented Perkins, a former Hewlett-Packard Co. director, during a scandal at that company.**

News Corp. Chairman Rupert Murdoch and his son James appeared today before a committee of the U.K. Parliament to answer questions about the company's role in phone hacking by the News of the World tabloid. The Federal Bureau of Investigation is looking into whether News Corp. employees tried to hack the voice mail of victims of the Sept. 11 terrorist attacks in the U.S.

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[105] PANEL III OF A HEARING OF THE SENATE JUDICIARY COMMITTEE; SUBJECT: CONTINUATION OF EXECUTIVE NOMINATION OF MICHAEL MUKASEY TO BE ATTORNEY GENERAL OF THE UNITED STATES, Federal News Service October 18, 2007

[106] http://www.debevoise.com/insights/news/2009/02/michael-b-mukasey-to-join-debevoise--plimpton and http://www.debevoise.com/michaelmukasey

White, chairwoman of the litigation department at New York-based Debevoise, spent 8 1/2 years as the top federal prosecutor in Manhattan before entering private practice and representing companies including Morgan Stanley and Bristol-Myers Squibb Co. In February 2009, she wooed Mukasey to the firm."[107] (emphasis added)

MUKASEY LOBBIED FOR CHAMBER OF COMMERCE TO REDUCE CORPORATE LIABILITY FOR BRIBERY IN MATTERS SUCH AS THE CURRENT FIFA AND WALMART SCANDALS

"Earlier this year, Mukasey was hired by the U.S. Chamber Institute for Legal Reform to lobby Congress on foreign bribery law, seeking changes that would limit companies' liability and exposure. U.S. lawmakers have asked the Justice Department and the Securities and Exchange Commission to probe News Corp. for possible violations of the Foreign Corrupt Practices Act, alleging that company employees may have paid U.K. police or other U.K. government officials for stories. "There are questions about whether the Foreign Corrupt Practices Act has been violated by Rupert Murdoch and his news empire," said Democratic Senator Dick Durbin on NBC's "Meet the Press" program.

Mukasey testified before a House of Representatives panel last month urging lawmakers to make six specific changes to the law, including the addition of a "compliance defense" that would protect companies from crimes committed by rogue employees or subsidiaries. "The FCPA, as it is currently written and enforced, leaves corporations vulnerable to civil and criminal penalties for a wide variety of conduct that is in many cases beyond their control or even their knowledge," Mukasey said in remarks prepared for the panel.

The Chamber has paid Mukasey $120,000 for his lobbying activities since he was hired in March, according to records filed with Congress. Dinh didn't return a telephone call and e-mail seeking comment. Mukasey didn't return two phone messages seeking comment."[108] (emphasis added)

[107] http://www.bloomberg.com/news/articles/2011-07-19/news-corp-independent-directors-hire-debevoise-firm-s-white-mukasey
[108] http://www.bloomberg.com/news/articles/2011-07-19/news-corp-independent-directors-hire-debevoise-firm-s-white-mukasey

(F) WHITE, THE SEC, AND THE RECUSAL DILEMMA

From the outset of the White nomination to the SEC, there were concerns about White's array of private interests that conflicted with the public interest. On the one hand, reformers were worried that between her old law firm (Debevoise), her old clients, and the work of her husband (a partner at leading corporate law firm Cravath, Swaine & Moore LLP), it would be improper for her to be involved in many of the enforcement areas of the SEC, and potentially some regulatory policy as well.

On the other hand, three SEC Commissioners are required to move forward on enforcement and regulatory matters. Given that the SEC's two Republican commissioners often vote as a bloc against enforcement, recusals from White threatened to undermine the SEC's effectiveness.[109]

That dilemma is baked into the extent to which White reflects the revolving door. If she had come from a public service, think tank, or academic background, this recusal dilemma would not have arisen.

1. WHITE'S CONFLICTS A "MINEFIELD"

BLOOMBERG COLUMNIST HIGHLIGHTED WHITE'S WEAK PROTECTIONS AGAINST CONFLICT OF INTEREST DURING HER CONFIRMATION PROCESS

"Here's the big question for Mary Jo White: If she becomes chairman of the Securities and Exchange Commission, where will her interests lie? With the public that pays her salary? Or with the people handing her the big bucks? White is the white-collar defense lawyer and former U.S. attorney nominated by President Barack Obama to lead the SEC. Her financial disclosures say that upon leaving New York-based Debevoise & Plimpton LLP, the law firm will give her $42,500 a month in retirement pay for life, or more than $500,000 a year. This means she has a direct interest in Debevoise's future profits, and therefore an incentive to help make sure only good things come the firm's way. Debevoise's partner-retirement plan is unfunded, meaning the firm pays benefits from its continuing business operations. [. . .]

Clients listed by White include the accounting firm Deloitte & Touche LLP, whose China affiliate is being sued by the SEC for refusing to comply with an SEC subpoena. Others include General Electric Co., JPMorgan Chase & Co. and UBS AG, each of which has reached multiple settlements with the SEC's enforcement division. Some of White's other proposed remedies are puzzling. Her husband, John W. White, is a partner at the law firm Cravath, Swaine & Moore LLP. Her disclosure filing said he would "convert to a non-equity partner status" and receive a fixed salary and annual performance bonus. The disclosures didn't say how much money he would get for his Cravath stake or his yearly pay. For all we know, his steps to address conflicts of interest might make them

[109] Cf. http://www.warren.senate.gov/files/documents/2015-6-2_Warren_letter_to_SEC.pdf (pp. 8-10), http://www.nytimes.com/2015/02/24/business/dealbook/sec-hamstrung-by-its-leaders-legal-ties.html?_r=0

worse. White said she would avoid matters involving Cravath or its clients, unless authorized by the SEC's chief ethics officer. Cravath, like Debevoise, is one of the country's most prominent corporate-law firms. That means a lot of potential recusals -- taking her out of the mix on decisions that might be crucial to regulating U.S. capital markets, and possibly leaving the five-member commission deadlocked in 2-2 votes.

White's husband also sits on advisory panels to the Financial Accounting Standards Board and the Public Company Accounting Oversight Board. White said she would decline to participate during her SEC tenure in any matter involving either board, unless authorized. Those are unpaid positions with no authority to set policy. It isn't important to the country for John White to be in those groups, which meet only a few times a year. It is important that the SEC chairman have unfettered ability to weigh in on U.S. accounting and auditing standards, as well as the oversight of audit firms. White's husband should step down from those posts.

White undoubtedly has solid experience for the job. She needs to decide which she wants more: to serve the public, or to cling to the trappings of life as a tall-building lawyer. Most importantly, her finances shouldn't be tied to Debevoise's fortunes in any way, now or in the future. She should know this already. So should the senators asking questions at her confirmation hearing."[110]

MARY JO WHITE CONFLICTS WERE TERMED A "MINEFIELD" BY CONVINGTON & BURLING ATTORNEY

"**She would have quite a minefield to navigate," said Robert Kelner, an attorney who is an expert in government ethics rules at the law firm Covington & Burling in Washington.** "But this is not unusual for a senior-level appointee coming out of a law firm."

White could have to abstain from votes on matters involving former clients at a time when the SEC has been struggling to regain investor confidence among regulators and financial markets. **Government ethics rules generally prevent commissioners from participating in matters in which they or their spouses have any financial stake, or have any interest that could raise questions about their impartiality, Kelner said.** These rules generally restrict commissioners from taking part in cases they worked on while in the private sector -- whether to bring a securities fraud lawsuit against a former client, for example, Kelner said. White could still be involved in other matters dealing with former clients, just as long as she hasn't previously worked on the other side of particular cases before the SEC, Kelner said.

What could also complicate White's tenure at the SEC is an ethics pledge Obama has required executive-branch appointees to sign since he took office. Aiming to limit the effects of the "revolving door" between government officials and the private sectors they regulate, the ethics pledge precludes appointees from participating in any matter involving "specific parties that is directly and substantially related" to their "former

[110] http://www.bloombergview.com/articles/2013-02-14/mary-jo-white-s-latest-conflict-of-interest

employer or former clients." Kelner said the pledge generally would not apply to broad regulations or policies."[111] (emphasis added)

MARY JO WHITE'S TESTIMONY DURING CONFIRMATION HEARINGS DEFENDED HER APPARENT CONFLICTS OF INTEREST ON THE BASIS OF (A) SIMILARLY SITUATED PREDECESSORS & (B) RELYING ON SEC ETHICS OFFICIALS

"*Ms. White:* Thank you, Mr. Chairman. Before I agreed to be nominated for this position, I detailed to the White House, the Independent Office of Government Ethics, and the career SEC ethics official the nature and extent of my and my spouse's and our firm's legal practices to be certain that there were no conflicts that could be problematic or limit my ability to function effectively as SEC Chair, if I were to be nominated and confirmed. I went through a very rigorous process of my own and with these parties to ensure that I am in compliance with all ethics regulations and laws. And I am very scrupulous about these issues and place a very high bar on them, and I was also focused in that process very much on making certain I could effectively function as the Chair.

I know the Senate has received a letter from the Office of Government Ethics concluding that I am in full compliance with all applicable laws governing ethics and conflicts of interest.

I was also advised in this process that while I have recusals, as do many nominees, mine were not out of the ordinary in scope, nor out of the ordinary for past Chairmen or other Commissioners of the SEC.

The career ethics officials at the SEC are quite experienced in managing these conflicts, should they arise. I will also be very vigilant in managing them myself and making sure that we are scrupulously attending to any that might arise. But I do not believe, Mr. Chairman, that the recusals, the extent of them, will prevent me from fully performing my duties. In general, I am not recused from any SEC rulemaking matters or policy matters, and as to party matters, as they are known, which primarily affects the enforcement function of the SEC, the scope of those recusals is also quite narrow."[112] (emphasis added)

MARY JO WHITE'S WEALTH, ANALYZED BY *ABOVE THE LAW*: UP TO $35 MILLION, PLUS RESIDENTIAL ASSETS

"In the words of my colleague Elie Mystal, a former Debevoise & Plimpton associate, she's "one of those alpha dog partners…. the kind of partner that makes other partners

[111] "MONDAY BUSINESS; SEC pick could face conflicts; Ethics rules could force Mary Jo White, if confirmed, to sit out of some decisions," by Andrew Tangel, Los Angeles Times, February 18, 2013, Part A; Pg. 12.
[112] http://www.gpo.gov/fdsys/pkg/CHRG-113shrg80698/html/CHRG-113shrg80698.htm , HEARING before the COMMITTEE ON BANKING,HOUSING,AND URBAN AFFAIRS, UNITED STATES SENATE ONE HUNDRED THIRTEENTH CONGRES, FIRST SESSION ON NOMINATIONS OF: Richard Cordray, of Ohio, to be Director of the Bureau of Consumer Financial Protection and Mary Jo White, of New York, to be a Member of the Securities and Exchange Commission, MARCH 12, 2013.

stammer, shuffle papers, and try to look really busy and intelligent when she's in the room."

The sizable net worth of Mary Jo White shouldn't surprise anyone. Not only is she a longtime Debevoise partner, but her husband, John W. White, has been a partner at Cravath, Swaine & Moore for more than 25 years (interrupted from 2006 through 2008 by a stint at the SEC, actually, where he served as Director of the Division of Corporation Finance).

Let's get a sense of Mary Jo White's fortune…. White's financial disclosure form can be accessed here, and her letter outlining the steps she'll take to avoid conflicts of interest as SEC chair appears here. (The most notable step, which we mentioned in Morning Docket, is that her husband will move from equity to nonequity status at Cravath. As CSM's first nonequity partner, John White will receive a fixed salary and a performance bonus, instead of a cut of the firm's profits.) [. . .] The heart of the disclosure is Schedule A, a listing of assets and their approximate values, which in White's case spans four pages. Because the values are reported in ranges (e.g., $250,001 to $500,000, $500,001 to $1,000,000), and because the ranges top out at $5 million for Mary Jo White (as the filer) and $1 million for John White (as the filer's spouse), we don't know the exact total value of her assets, which is too bad. But Am Law Daily and DealBook have crunched the numbers and concluded that they amount to at least $16 million. […]

But please note: the Whites' true wealth is surely much higher. First, $16 million assumes every listed asset is at the lowest end of the applicable range. Seven of their investments fall in the "$1,000,001 to $5,000,000" range, and six more are in the "over $1,000,000 range," which is all that has to be disclosed for assets owned solely by John White as the filer's spouse (such as his capital account at Cravath). The $16 million figure assumes these assets are worth $1 million each or $7 million in total, when in reality they could be worth as much as $35 million in total.

Second, filers are generally not required to disclose the value of their primary residences. We're guessing the Whites have several million dollars in equity in their Manhattan apartment. (Elie's been to the Whites' home for Debevoise events, and apparently it's a spectacular floor-through apartment in an elite co-op building.)

Third, the $16 million figure does not include a liquidated amount for Mary Jo White's interest in Debevoise & Plimpton's unfunded partnership retirement plan. That entitles her to receive $42,500 a month upon retirement, or $510,000 a year. As stated in White's ethics letter, within 60 days of her appointment, "the firm will make a lump sum payment, in lieu of making monthly retirement payments for the next four years." So that should add a tidy sum to White's assets."[113]

[113] http://abovethelaw.com/2013/02/just-how-rich-is-mary-jo-white-debevoise-partner-and-likely-future-sec-chair/

2. RECUSALS MAY HAVE BEEN NECESSARY, YET ALSO UNDENIABLY HARMFUL

WHITE RECEIVED A WAIVER IN ORDER TO OVERSEE CREDIT SUISSE BASED ON ACKNOWLEDGMENT THAT THE RECUSAL – NECESSARY BECAUSE OF HER CONFLICT OF INTEREST – ITSELF UNDERMINED THE "PUBLIC'S INTEREST"

"Mary Jo White, the head of the Securities and Exchange Commission (SEC), will be allowed to oversee her former client, Credit Suisse, according to a new ethics waiver the U.S. Office of Government Ethics posted to its website this week (PDF). […]**The waiver goes on to assert that the public's interest has been harmed by White sitting on the sidelines. "Thus far, as Chair of the Commission, you have been recused from particular matters involving Credit Suisse," the waiver says. "This has led to a situation in which your leadership, experience, and expertise have not been brought to bear on significant matters before the Commission.**""[114] (emphasis added)

THE *WALL STREET JOURNAL* REPORTED THAT THE "LONDON WHALE" CASE WAS IMPERILED BY WHITE & HER CHOSEN ENFORCEMENT HEAD'S RECUSALS

"Washington's revolving door gets a lot of lip-service but the ramifications were on clear display Thursday, when the Securities and Exchange Commission settled its London "whale" case against J.P. Morgan Chase & Co. Only three of the agency's five commissioners voted on the settlement, which included an acknowledgement of wrongdoing by the bank. SEC Chairman Mary Jo White and Republican Commissioner Daniel Gallagher were recused from the case given legal work their previous employers – Debevoise & Plimpton LLC and Wilmer Cutler Pickering Hale and Dorr LLP — had done for J.P. Morgan.

The settlement itself was the product of an investigation by just one of the SEC's top enforcement cops, with the agency's co-director of enforcement, Andrew Ceresney, also recused because of his work at Debevoise. The SEC got its settlement – but just barely. It turns out that just two of the commissioners approved the enforcement action, with Republican Commissioner Michael Piwowar voting against it. Mr. Piwowar, a former aide to Sen. Mike Crapo (R., Idaho) who joined the SEC in August, voted no, according to a person familiar with the matter.

The thin margin may not matter in the J.P. Morgan case – the bank settled and, in a big win for the agency, admitted wrongdoing. But not every SEC case is settled: The agency often files charges against firms or individuals, which requires a sign-off by a majority of the commission. Lawyers say a razor-thin margin of approval to bring charges could hurt the SEC's chances of winning a case down the road. And failure to secure a majority would mean an enforcement case could not proceed."[115] (emphasis added)

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[114] http://www.pogo.org/blog/2014/02/head-of-sec-given-waiver-to-oversee-past-client.html RE http://www.oge.gov/Open-Government/Pledge-Waivers/White_Mary_Jo_waiver/

[115] http://blogs.wsj.com/washwire/2013/09/19/washingtons-revolving-door-catches-sec/

MARY JO WHITE'S BROAD FINANCIAL INTERESTES HAVE DEBILITATED THE SEC IN CRITICAL MATTERS

"Their legal careers, and by extension their marriage, are the stuff of lore. Mary Jo White leads the Securities and Exchange Commission; her husband, John, practices law at an old-guard firm as elite as the corporations it represents. Together, they are a legal power couple that straddles Wall Street and Washington like few others. Their careers, however, can at times collide, generating headaches for the S.E.C. as it pursues wrongdoing in the nation's financial markets, according to interviews with lawyers and a review of federal records. In the nearly two years since Ms. White took over the agency, she has had to recuse herself from more than four dozen enforcement investigations, the interviews and records show, sometimes delaying settlements and opening the door, in at least one case, to a lighter punishment.

The interviews and records detail for the first time the extent of Ms. White's recusals and the implications of her absence. When ethics rules force her out of cases, the S.E.C. loses her expertise as a former federal prosecutor who has pledged a tough line on Wall Street, underscoring the unintended consequences of recruiting government officials from the small world of the legal elite.

Ms. White has sat out of cases that involve Debevoise & Plimpton, where she worked as a defense lawyer, and her clients there, which included JPMorgan Chase and Bank of America's former chief executive. Those restrictions, which account for most of her recusals, end in April. **But in a surprising twist, Ms. White will have to keep sitting out cases that involve her husband's firm, Cravath, Swaine & Moore. So far, she has had to recuse herself from at least 10 investigations into clients of Cravath, interviews and records show, including some that came before Ms. White joined the agency and at least four that involved Mr. White himself.**

Because of ethics rules that Ms. White follows, she must leave all Cravath cases in the hands of the commission. Without Ms. White, some cases have split the agency's four remaining commissioners, pitting two Democrats who have endorsed the public uproar over financial wrongdoing against two Republicans who have expressed reservations about levying big corporate fines. Ms. White, a former United States attorney in Manhattan who promotes big fines and admissions of wrongdoing, would otherwise provide the deciding fifth vote.

The prospect of a party-line stalemate without her has helped shape a case against the Computer Sciences Corporation, a large technology company suspected of accounting irregularities. Knowing that they faced a split commission, S.E.C. enforcement officials discussed the case with at least one Republican commissioner, focusing on the size of the financial penalty. After those discussions and negotiations with Cravath, the officials agreed to settle for $190 million, tens of millions of dollars less than the agency originally pressed for, according to lawyers briefed on the matter who spoke on the condition that they not be named.

A penalty of $190 million looks large by the standards of recent accounting cases, and the S.E.C. often begins negotiations with an inflated demand that it eventually lowers.

Still, the lawyers briefed on the matter said that some S.E.C. officials felt that Ms. White's recusal made it harder to secure an amount that they thought was warranted."[116] (emphasis added)

2. MARY JO WHITE'S HUSBAND A PARTNER AT ELITE CORPORATE LAW FIRM CRAVATH, SWAINE & MOORE, MANY OF WHOSE CLIENTS HAVE A DISTINCT INTEREST IN THE SEC'S WORK

WANT THE SEC TO DEADLOCK? JUST HIRE (LEADING LAW FIRM) CRAVATH:

"**Enforcement staff members have expressed concern that companies facing S.E.C. investigations might choose to hire Cravath to neutralize Ms. White.** (While companies might be tempted to do so, it has not become a widespread pattern, records show.) Cravath did represent the cosmetics company Avon and the aluminum producer Alcoa in foreign bribery cases, forcing Ms. White's recusal in both. Cravath represented both companies before Ms. White joined the S.E.C. Ms. White also withdrew from an accounting case against two former executives at Affiliated Computer Services, an information technology company bought by Xerox, long a Cravath client. Without Ms. White, the remaining commissioners fought over whether to approve the case. One Democrat, Luis A. Aguilar, issued a public dissent, calling the settlement "a wrist slap at best."[…]

He also played a role in the Computer Sciences accounting case, the lawyers said. Cravath entered that case early last year, joining another law firm, Cadwalader, Wickersham & Taft. Although the four commissioners have yet to vote on the case, Computer Sciences has already publicly disclosed the contours of a settlement, saying it expects to pay the $190 million penalty and restate its earnings. Initially, lawyers said, the S.E.C. sought about $300 million. [. . .] But concerns also arose at the S.E.C. about not demanding an admission of wrongdoing from Computer Sciences, the lawyers said. Months after telling the company to admit to misdeeds, the S.E.C. backed down, the lawyers said, a rare about-face that stemmed from concerns that the admission would imperil the company's role as a government contractor. Without Ms. White voting on the case, the S.E.C. officials favoring such an admission may have lost a potential supporter. In 2013, she announced plans to shift the agency away from its decades-long practice of allowing virtually all defendants to settle without admissions of wrongdoing, making it a central element in her enforcement platform. "[117] (emphasis added)

EVEN WARREN CRITIC AND BANK SUPPORTER MATT LEVINE ACKNOWLEDGED THAT THE CRAVATH/HUSBAND RECUSAL ISSUE IS A PROBLEM FOR MARY JO WHITE

[116] http://www.nytimes.com/2015/02/24/business/dealbook/sec-hamstrung-by-its-leaders-legal-ties.html?_r=0
[117] http://www.nytimes.com/2015/02/24/business/dealbook/sec-hamstrung-by-its-leaders-legal-ties.html?_r=0

"(4) that White frequently recuses herself from enforcement actions because her husband is a lawyer at a firm that represents big banks. The fourth topic is, I mean, personally awkward, but kind of legitimate. ("Get Mary Jo White recused from your SEC case!" could be in Cravath's advertising.)"[118]

NEW YORK TIMES: WHITE'S HUSBAND IS NOT A LITIGATOR BUT AN INFLUENCER WHO GETS RESULTS WITH GOVERNMENT OFFICIALS

"Of the roughly 10 Cravath cases that required Ms. White's recusal, Mr. White helped handle at least four, the interviews show. **Mr. White, a former S.E.C. official who specializes in corporate disclosures, is not a litigator. His role in the cases, the lawyers said, often amounted to making a phone call or sending an email, or working behind the scenes on a company's disclosures.** In the Avon case, Mr. White appeared in person at a meeting with Justice Department and S.E.C. officials, one lawyer said."[119] (emphasis added)

3. DEBEVOISE RETIREMENT PLAN – A CONFLICT OSTENSIBLY ADDRESSED

SHERROD BROWN INQUIRED REGARDING THE DEBEVOISE RETIREMENT PLAN DURING CONFIRMATION HEARINGS, ASKING "WHY NOT CUT ALL FINANCIAL TIES WITH DEBEVOISE?"

Q.6. Upon leaving, your law firm, Debevoise & Plimpton, will give you $42,500 a month in retirement pay for life, or $510,000 per year, through the firm's partner-retirement plan. Debevoise would make a lump-sum payment to you in lieu of monthly retirement checks for the next 4 years, while you serve as SEC Chair. After that, your monthly payments would resume for life. Other Chairmen and Commissioners--Republicans Harvey Pitt and Daniel Gallagher, for example--severed all financial ties with their law firms when they went to work at the SEC.

Doesn't your compensation arrangement create the perception that your financial future is tied to the performance of your former firm?

Why not cut all financial ties with Debevoise & Plimpton?

A.6. If confirmed, I will retire from Debevoise & Plimpton LLP.

I do not believe that the payment of retirement benefits to me should raise the perception you note. This retirement arrangement has been vetted by the U.S. Office of Government Ethics (OGE) and does not constitute a continued interest in the profitability or performance of the firm. I have earned this retirement benefit as a result

[118] http://www.bloombergview.com/articles/2015-06-03/voicemail-waivers-and-culture
[119] http://www.nytimes.com/2015/02/24/business/dealbook/sec-hamstrung-by-its-leaders-legal-ties.html?_r=0

of my years of work at the firm. (It is my understanding that neither former Chairman Pitt nor Commissioner Gallagher was eligible for retirement or retirement benefits at the time they left their firms to join the SEC.) The retirement benefit that I am entitled to receive is the same benefit available to any retiring partner at the firm. Like all retired partners, under the retirement plan, I am entitled only to the specified lifetime benefits, not to the cash value of such benefits in an up-front payment. And, although there is no realistic possibility that any matter at the SEC could impact Debevoise's willingness or ability to make the required retirement payments to me, under the terms of my Ethics Agreement, I would be recused from participating in any such matter."[120]

FUNDING FOR THE DEBEVOISE PENSION HAS BEEN DEEMED SO UNRELIABLE AS TO SPUR A STAR PARTNER TO SWITCH TO A FIRM WITH "A FUNDED PENSION," PER THE *NEW YORKER*

"Then he heard from Stephen Best, a LeBoeuf partner in the Washington office, that his friend Ralph Ferrara, a star securities litigator, might be willing to consider a move. Ferrara had started a Washington office of Debevoise & Plimpton, one of the smaller New York firms in the Cravath mold. **Davis visited Ferrara in Washington, and learned that the Debevoise pension plan was unfunded. If the firm ran into trouble, it might not be able to meet its pension obligations. Ferrara was blunt about what he wanted: a funded pension.**"[121] (emphasis added)

***BLOOMBERG* COLUMNIST JONATHAN WEIL NOTED THAT WHITE'S REFUSAL TO CUT TIES WITH DEBEVOISE BREAKS PRECEDENT**

"White is the white-collar defense lawyer and former U.S. attorney nominated by President Barack Obama to lead the SEC. Her financial disclosures say that upon leaving New York-based Debevoise & Plimpton LLP, the law firm will give her $42,500 a month in retirement pay for life, or more than $500,000 a year.

This means she has a direct interest in Debevoise's future profits, and therefore an incentive to help make sure only good things come the firm's way. Debevoise's partner-retirement plan is unfunded, meaning the firm pays benefits from its continuing business operations. The proof that this poses a problem can be seen in her proposed solution. White, 65, said that after she is confirmed by the U.S. Senate, Debevoise would make a lump-sum payment to her in lieu of monthly retirement checks for the next four years. After that, when presumably she is no longer the SEC's chairman, her monthly payments would resume for life.

For someone with a reputation for caring deeply about her reputation, this is a serious error in judgment. Think about it: If there's nothing wrong with having a financial interest in Debevoise, why not take the firm's monthly checks while she's SEC chairman and skip the lump sum? Alternatively, if she believes there is something wrong with being owed

[120] http://www.gpo.gov/fdsys/pkg/CHRG-113shrg80698/html/CHRG-113shrg80698.htm , HEARING before the COMMITTEE ON BANKING,HOUSING,AND URBAN AFFAIRS, UNITED STATES SENATE ONE HUNDRED THIRTEENTH CONGRES, FIRST SESSION ON NOMINATIONS OF: Richard Cordray, of Ohio, to be Director of the Bureau of Consumer Financial Protection and Mary Jo White, of New York, to be a Member of the Securities and Exchange Commission, MARCH 12, 2013.

[121] http://www.newyorker.com/magazine/2013/10/14/the-collapse-2

money by Debevoise while she's SEC chairman, why not cut off all ties with the firm and negotiate a one-time payment that settles everything? There's no good reason she shouldn't. There's also a precedent for doing so.

The last time a partner from a major law firm was picked as SEC chairman was in 2001, when President George W. Bush appointed Harvey Pitt of Fried, Frank, Harris, Shriver & Jacobson LLP. Pitt, a renowned securities lawyer who had been at the firm 23 years, severed all relationships with Fried Frank, taking a lump-sum payment for all future amounts he was owed, discounted for the time value of money. "Because the SEC regulates public companies, it is better for the public to know that the commissioners of the SEC do not have any other financial interest other than the U.S. public and the U.S. government," Pitt told the Senate Banking Committee at his confirmation hearing in July 2001."[122]

[122] http://www.bloombergview.com/articles/2013-02-14/mary-jo-white-s-latest-conflict-of-interest

(G) CONCLUSION

Mary Jo White has been deeply committed to the revolving door, not only in her career, but in the people she hires. As a prosecutor, she was less ardent in pursuing white collar criminal cases than others, such as Manhattan DA Robert Morgenthau. Indeed, she attempted to end Morgenthau's legendary career by chairing a campaign that argued (unsuccessfully) that he was excessively focused on prosecuting white collar criminals.

During her time as an attorney for Wall Street, which constitutes the majority of her pre-SEC career, White seems to have provided effective counsel to Wall Street. That effectiveness was often based on her public service credentials and connections, connections that worked well for clients such as Siemens (which had violated the Foreign Corrupt Practices Act) as well as Morgan Stanley. At the same time, those credentials played out poorly for enthusiastic non-revolving door prosecutor Gary Aguirre, who was fired as the unintended, but (according to Senate Republican staffers) direct, consequence of his aggressive work on behalf of Morgan Stanley.

White's public statements bemoaned aggressive white collar criminal enforcement and her hiring practices have demonstrated significant fealty to the revolving door. Her ongoing connections to Debevoise & Plimpton (via her pension) and Cravath, Swaine & Moore LLP (via her husband) have created a dilemma for financial regulatory reform advocates who seek an SEC with at least three Commissioners uncaptured by Wall Street.

Mary Jo White's career is less in line with the sobriquet "Wall Street's sheriff" and more in with the phrase "regulatory capture." With two pending openings for SEC commissioners, the Obama Administration can and should avoid another case of the predictable disappointment Mary Jo White's tenure has produced for white collar criminal enforcement.

The Administration should attend to lessons from Mary Jo White's career of consistent coziness with the elite companies and individuals she regulates. Instead of looking to the revolving door to fill current future openings at the SEC, the Administration should endeavor to select future nominees from more diverse backgrounds, such as public service, think tanks, and academia.

MARY JO WHITE, THE SEC, AND THE REVOLVING DOOR

ROOTSTRIKERS