COMPLAINT TO THE COUNCIL OF THE INSPECTORS GENERAL ON INTEGRITY AND EFFICIENCY CONCERNING THE SECURITIES AND EXCHANGE COMMISSION'S OFFICE OF THE INSPECTOR GENERAL

TO:	Mark D. Jones, Executive Director Council of the Inspectors General on Integrity and Efficiency ("CIGIE")
CONCERNING:	The Office of the Inspector General for the Securities and Exchange Commission
COMPLAINANT:	Nancy E. McGinley, Senior Counsel, Division of Enforcement Securities and Exchange Commission ("SEC")
DATE:	April 5, 2011

INTRODUCTORY STATEMENT

On March 1, 2011, the SEC issued a Letter or Reprimand "Letter" against Complainant, which it subsequently withdrew on April 1, 2011, one day after the end of the March 31, 2011 reporting period for the SEC OIG's Semi-Annual Report to Congress. The Letter is the latest in a series of deceitful, defamatory, and possibly criminal actions ("Deceptive Actions") that the Securities and Exchange Commission ("SEC"), beginning with its Ethics Office ("Ethics Office"), part of its Office of the General Counsel ("OGC"); continuing with its Office of the Inspector General ("OIG"); and concluding with its Office of Human Resources ("OHR"), undertook and continues to undertake against Complainant. These Deceptive Actions have been unjustified and afforded Complainant no due process (E1-E2.)[1]

In the Letter, signed by an Assistant Director of the OHR ("OHR AD"), the OHR AD misleadingly ignores key provisions of the SEC's policies concerning use of office equipment, perhaps in an attempt to justify the existence and publication of the false and misleading OIG Report of Investigation for Case No. OIG-481, dated March 9, 2009 ("ROI"),[2] that had "found," *inter alia*, that Complainant had possibly traded on inside information. By disciplining Complainant, the OHR could assist the SEC in appealing to the unwarranted, highly publicized demands for "justice" that the OIG's fraudulent "finding" against Complainant and the SEC's responses to this "finding" have engendered (E107-E108, E166-E179.)

The timing of the SEC's Letter, dated March 1, 2011, will also enable the OIG to report in its

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[1] Page numbers denoted herein beginning with "E" refer to Complainant's exhibit, which is attached.

[2] The ROI is entitled, "Employee Securities Transactions Raise Suspicions of Insider Trading and Create Appearances of Impropriety; Violations of Financial Reporting Requirements; and Lack of SEC Employee Securities Transaction Compliance System (E109-E161)."

Semi-Annual Report to Congress for the six-month period ending March 31, 2011 — two years after the OIG issued its false and well-publicized ROI — that the SEC has *finally* and *duly* "disciplined" Complainant for her supposed "misconduct" and has examined the "evidence" concerning the alleged insider trading. Complainant's "discipline" will also enable the SEC to conceal from the public and Congress, the great waste of taxpayer funds in this entire process, the incompetence and lack of integrity of the SEC agents involved, the SEC's and OIG's abuses of power, and the SEC's unceasing deceptions in this matter.[3]

OVERVIEW OF DECEPTIVE ACTIONS AGAINST COMPLAINANT

The **Ethics Office's Deceptive Actions** concerning Complainant include: (1) giving Complainant explicit assurances, upon which Complainant relied, that Complainant's trading strategy and the level of trading in Complainant's securities brokerage account were not problems; (2) failing to advise Complainant of any concerns the Ethics Office may have had concerning the level of trading in Complainant's account, particularly given its prior explicit assurances; (3) referring Complainant's trading to the OIG without justification; and (4) misrepresenting to the OIG "concerns" about Complainant's trading.

The **SEC OIG's Deceptive Actions** concerning Complainant, which possibly, if not most likely exceeded statutory authority, and which may very well have violated 18 U.S.C. §1001(a),[4] include: (1) investigating whether Complainant had cleared all securities trades with the Ethics Office, even though such clearances were not required under the SEC's Rule 5 (E3-E8), despite the OIG's assertions to the contrary; (2) reporting falsely in its ROI that Complainant (a) had engaged, possibly, in insider trading by trading on the basis of non-public information even though the OIG *knew or should have known* that the allegedly material, non-public information (e.g., "inside information") on which Complainant purportedly traded was public information at the time of Complainant's trading; and (b) had violated Rule 5 because Complainant had "lacked proof" of having cleared all trades with the Ethics Office; (3) allowing its bogus ROI with its false accusations

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[3] The SEC's withdrawal of the Letter on April 1, 2011, one day after the end of the OIG's March 31, 2011 Semi-Annual reporting period, supports Complainant's contention that the issuance of the Letter, which was unjustified, was merely a ruse to create "paper" that the SEC had "dealt" with the ROI, and to obscure from Congress and the public the SEC's and OIG's waste, fraud and abuse of taxpayer money in connection with the OIG investigation.

[4] Section 1001(a) of Title 18 provides: "Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully— (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years."

and fraudulent findings to be leaked to the public in a manner that allowed Complainant's name[5] to be linked publicly to its bogus "finding" of possible insider trading;[6] (4) misrepresenting to at least one house of Congress that Complainant *possibly had engaged in insider trading*; and (5) misrepresenting to the Department of Justice, specifically the Office of Fraud & Public Corruption of the U.S. Attorney's Office in the District of Columbia ("DOJ"), that Complainant *possibly had engaged in insider trading*; and (6) perhaps misrepresenting to the DOJ that the OIG "suspected" that Complainant may have obstructed justice under 18 U.S.C. § 1519,[7] by having provided false Forms 681 to the OIG, with the result that Complainant was also subjected to potential malicious prosecution, if not malicious prosecution.[8]

The **OHR's Deceptive Actions** concerning Complainant include: (1) failing to maintain all of the Forms 681 that Complainant had filed with OHR concerning her securities trading; (2) perhaps forwarding to the OIG a significantly incomplete portfolio of Complainant's Forms 681; (3) not informing the OIG of its inadequate record-keeping practices;[9] (4) claiming, as it does in the Letter, that Complainant had "failed to timely file a [single] Form 681" with the OHR;[10] (5) "finding" that "the record" contained "insufficient" evidence that Complainant had traded on inside information, a finding that misleadingly suggests (A) that *some evidence existed* and warranted such a review, (B) that a genuine investigative record to review existed; and (B) that the OHR AD— a layperson in securities law, supposedly posing not only as a prosecutor, but as an expert instructing herself on the law of insider trading and as a fact finder applying the law to the "facts" — was qualified to conduct a review and make such a finding concerning Complainant; and (6)

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[5] Complainant does not know who leaked her name or how it was leaked to the press and the public. It is unclear whether one or more SEC agents provided her name directly to the press or whether the ROI provided information sufficient to allow SEC agents to guess her identity. Given the OIG's other deceitful and misleading actions and statements, Complainant submits that one or more of its agents cannot be ruled out as culprits.

[6] The consequence was the defamation of Complainant and her reputation. Press reports accepting the "truth" of the OIG's assertions and claiming that Complainant, while an SEC Enforcement attorney, possibly traded on inside information appeared in the *Wall Street Journal* and internationally, including articles published in Australia and Russia (E169-179.)

[7] Section 1519 of Title 18 provides: "Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both."

[8] Complainant also incurred — needlessly — legal fees relative to this fraudulent conduct.

[9] OHR had failed to input information on, or lost or destroyed Forms 681 concerning 34 of the 247 total trades (over 15%) that Complainant had reported to OHR.

[10] OHR may not have transmitted to the OIG most, if any, of Complainant's Forms 681. Complainant had produced to the OIG copies of Forms 681 for 245 of her 247 trades, of which OHR had no record of 36. It appears that the only Forms 681 in the OIG investigative record are the copies that Complainant had provided (Exhibits to the ROI, Volume IV of VI, Tab 27.) In her Letter, the OHR AD notes that the OHR will not discipline Complainant for not having filed a single Form 681, but fails to note that the OHR may have lost or destroyed some, most, or all of Complainant's Forms 681, or that her "finding" was simply an inference based on *Complainant*'s failure to produce a copy.

"finding" that Complainant had engaged in "misconduct" by using Complainant's SEC computer to execute trades for Complainant's personal brokerage account,[11] a finding that: (A) required the OHR AD unscrupulously and deceptively to apply, *ex post facto,* a provision found only in a later version of the SEC's Office Equipment Rules (E13-E16); and that (B) deceptively ignored key permissive provisions in those same rules, upon which Complainant relied, including one that *specifically allows* SEC employee to check personal brokerage accounts (E10, E14).[12]

SPECIFIC DECEPTIVE ACTIONS AGAINST COMPLAINANT

1. The Ethics Office's Referral of Complainant to the OIG

The ROI states that on January 23, 2008, the Ethics Office referred Complainant's trading to the OIG because *Complainant had frequently contacted the Ethics Office seeking to obtain clearances to trade securities* (E110). This frequent contact had raised the Ethics Office's "suspicions" that Complainant might be engaged in "day trading" or "insider trading," and might also have violated the Commission's Conduct Rule 5,[13] albeit in an unspecified manner (E110).

A preliminary inquiry into the non-specific referral reveals its questionability about not only the alleged "day trading" and "insider trading" concerns, but also about the real reason for the referral and the discerning and counseling abilities of the Ethics Office, which had previously assured Complainant that her trading was not problematic. First, Complainant's challenged transactions all involved equity securities, and neither the Ethics Office nor the OIG has ever suggested that Complainant failed to comply with Rule 5's six-month holding period for stocks. "Frequent trading" is synonymous with short-term trading, and if Complainant's compliance with the holding period was not challenged, as it was not, no one could reasonably suspect her of "day trading."[14]

Second, any "concerns" about Complainant's possible insider trading are equally questionable. The stock holding period of six-months is designed to *prevent speculation and sales* of portfolio stock immediately upon an owner's acquisition of *adverse information* about an issuer.

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[11] The OHR AD's Letter uses the Rules of the Road the SEC promulgated in April 2009, one month after the OIG issued the ROI. Whether the OHR AD knew that these revised Rules of the Road did not apply to Complainant at the time of the OIG investigation is unknown, but suggests that she her "review" of the "record" was, at best, very limited. (E2, E13-E16 at E15).

[12] Complainant is not addressing any allegations in the ROI concerning Greivant's OGE Forms 450 because OHR exonerated her concerning the OIG's findings (E1.)

[13] 17 C.F.R. § 200.735-5 (E3-E8).

[14] *Barron's Dictionary of Finance and Investing Terms*, 6th ed., defines "day trade" as the "purchase and sale of a position during the same day" (p. 160). A holding period exceeding one day renders "day trading" *literally impossible*; one of six months makes it *figuratively impossible*. The frequency of Complainant's trade-approval requests suggested that Complainant was reporting every proposed trade, and the Ethics Office easily could have determined whether Complainant had bought and sold the same position in the same day.

The only "inside information" Complainant could possibly have had was knowing the existence of an otherwise *undisclosed* SEC investigation. The fact that an investigation exists, whether undertaken by the DOJ or the SEC or both, would enable one to infer that the *issuer's stock may be overvalued or subject to negative movement if and when the fact or results of the investigation become public.* Given Complainant's compliance with Rule 5's six-month holding period, she could only have sold on inside information if she learned of a still-undisclosed and non-public SEC investigation after her six-month period had expired.

Having been an attorney with the SEC's Division of Enforcement for almost thirty years, Complainant has seen, investigated, and recommended for civil action and criminal prosecution many very sophisticated insider trading schemes. *If* Complainant had wanted to ignore federal criminal laws, risk criminal sanctions, and risk losing her job, her legal license, and professional reputation, she: (1) would *not* have traded in her own name; (2) would *not* have complied with Rule 5 by seeking clearances from the Ethics Office; (3) would *not* have reported her trading on SEC Forms 681; (4) would *not* have traded small, odd-lots of stock for minimal profits; (5) would *not* have reported her annual holdings on OGE Forms 450; and (6) would *not* have provided documents to, or testified before the OIG. The Ethics Office's unfocused referral and OIG's crude and baseless theory of "possible" insider trading based on that referral evidence either deception or incompetence, or both.

The Ethics Office was either unwilling or unable to perform a preliminary analysis of Complainant's trading, and it chose not to ask Complainant about its non-specific concerns. Instead, and to the expense of the Complainant and taxpayers, it precipitously submitted a blanket referral to the OIG. The Ethics Office's "concern" was no doubt based on the volume of Complainant's reporting of trades as required by Rule 5; but Complainant suggests that the *problem of this volume* was not the propriety of any the trades themselves, but the work Complainant's reporting of those trades had imposed on Ethics Office personnel.

2. The OIG's False Statements to the Public, Congress, and the DOJ that Complainant "Possibly" Traded on Nonpublic or Inside Information

The OIG's investigation of Complainant was a mock process undertaken at taxpayer expense to justify a predetermined "finding"[15] that Complainant had traded on inside information. In fact, the *inside information* Complainant had "possibly" used in her trading was *public information* at the times of Complainant's trades, rendering insider trading *impossible*. The only issue the OIG "investigated" was the *level of uncertainty* it had to accept in the publication of its "finding" of "insider trading." Because "insider trading" was not possible, the OIG, instead of finding no insider trading, used the *level of greatest uncertainty*, finding that Complainant *possibly* traded on inside information. The SEC IG and the other two signatories to the false ROI (E109-161), no

[15] See, ROI, pp. 2, 8. The OIG's "finding" was not based on direct evidence and was not a true finding of fact at any standard of proof. Not surprisingly, the OIG did not generate direct or even circumstantial evidence that Complainant *actually possessed non-public information*, let alone *inside information*, or that Complainant had used such information *as the basis of any of her trades*.

doubt knew this "finding" would be newsworthy and generate significant publicity, even if it had been fabricated. In short, the SEC IG and the other two signatories to the ROI unjustifiably damaged Complainant's reputation for the glorification of their own (E166-179).

Complainant submits that the OIG's investigation was undertaken "to paper" a predetermined finding of insider trading, and was *not* a function of applying complicated securities laws to facts developed through investigation. Insider trading is a conceptually simple theory, which may explain its "popularity" with the press and public. The charge requires a showing that an alleged inside-trader: (1) possesses "inside information;" and (2) uses that "inside information" as basis of the questionable purchases or sales. "Inside information" is information that is (1)(A) "material" and (1)(B) "non-public."[16] Accordingly, information that is non-public may or may not be inside information, but inside information must be non-public. The terms are not strict synonyms. If information is public information that information cannot possibly be used as the basis to claim insider trading.

The OIG's ultimate deception was pretending that demonstrably public information, and even non-information, could be inside information[17]. The OIG included as possible non-public information the existence of two SEC non-public investigations, and future existence of a future SEC non-public investigation. For two of the three stocks, Citigroup, Inc. ("Citi")(E153-E155) and Schlumberger N.V. ("SLB")(E151-E152), the OIG conflated *non-public investigation* with *non-public information*, implicitly assuming that because all SEC investigations are non-public investigations, information that the SEC is investigating a company is non-public information ("Conflation Maneuver"). The Conflation Maneuver is deceptive because the existence of a non-public investigation often is public information.[18] By using the Conflation Maneuver against Complainant, the OIG ignored the fact that ongoing SEC or DOJ investigations of Citi and SLB had been public information well before Complainant's trades, making Complainant's purported insider trading *impo*ssi*ble*.[19]

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[16] The SEC has stated that information is "nonpublic" if it has not been disseminated in a manner making it available to investors generally, that insiders must wait a "reasonable" time after disclosure before trading, and that what constitutes a reasonable time depends on the circumstances of the dissemination.1212 Selective Disclosure and Insider Trading, 65 Fed. Reg. 51716, 51721, Release Nos. 33-7881, 34-43154, IC-24599 (August 24, 2000) (adopting release for Regulation FD and Rules 10b5-1 and 10b5-2). *Barron's Dictionary of Finance and Investing Terms*, 6th ed. notes that "inside information" generally involves "developments that would be considered *material* [and include] news of an impending takeover, introduction of a new product line, a divestiture, a key executive appointment, or other news that could affect the company's stock positively or negatively" (p. 334).

[17] The OIG did not address whether this information was "material." The stock charts suggest that it was not material because the stocks did not move much after the public release of the information about the SEC and DOJ investigations (E40, E57).

[18] Publicly traded issuers routinely report the existence of ongoing DOJ or SEC investigations in their filings with the Commission. The publication of this information may or may not impact the market price of the issuer's stock; if it does, arguably the information is material, if not, arguably it is not. In any event, it becomes public information.

[19] The OIG *imputed* to Complainant possession of non-public information based largely on Complainant's proximity to the investigative attorney looking into this company.

For the third stock, United Health Group, Inc. ("United Health")(E152-E153), the OIG imputed to Complainant knowledge of an SEC investigation that did not exist at the time of her trading. In effect, the OIG converted *non-information* into *inside information* ("Conversion Maneuver"). Using the Conversion Maneuver, the OIG ignored the fact that the triggering event for the *opening of the SEC investigation* — an article in the newspaper — occurred *after* Complainant's trades. In effect, this Conversion Maneuver made Complainant culpable under any circumstance: either for being a successful soothsayer and knowing in advance, or for having failed to anticipate the article and the subsequent SEC investigation.

The specific facts of Complainant's trades immediately follow.

a. *The OIG's Duplicitous "Finding" Concerning Complainant's Sale of Citi Stock*[20]

On August 3, 2007, after having obtained clearance from the Ethics Office on August 2, 2007 (E17), Complainant sold an odd-lot of forty (40) shares of Citi stock (E18-E20). The trade settled on August 8, 2007 (E18-E20) . Approximately seven months earlier, on February 23, 2006, Citi had disclosed in its Form 10-K the existence of the SEC investigation (E21-E23)[21] and continued disclosing the existence of investigation in a Form 10-K filed in February 23, 2007 (E24-E26). By August 3, 2007, the existence of the SEC investigation had long been public information that had been thoroughly discussed in the press (E27-E39).

b. *The OIG's Duplicitous "Finding" Concerning Complainant's Sale of SLB Stock*[22]

On January 23, 2008, after having obtained clearance from the Ethics Office (E41), Complainant sold an odd-lot of forty (40) shares of SLB stock, which settled on January 28, 2008[23] (E42-E44); she bought fifteen (15) shares on April 2, 2008, which settled on April 7, 2008 (E45-E49; and she bought another five (5) shares on April 24, 2008, which settled on April 29, 2008 (E45-E49). SLB had disclosed the existence of a DOJ criminal investigation into its possible Foreign Corrupt Practices Act ("FCPA") violations in a Form 10-Q filed on October 24, 2007, about three months before Complainant sold her forty shares (E50-E51).[24] SLB also continued to

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[20] ROI, pp. 44-46 (E153-E155.)

[21] Citi's disclosure stated: "The Securities and Exchange Commission is conducting a nonpublic investigation, which the company believes originated with the Company's accounting treatment regarding its investments and business activities, and loan loss allowances. . . . "

[22] ROI, pp. 42-43 (E151-E152).

[23] The OIG falsely states in the ROI that Complainant sold the 40 shares of Schlumberger on January 28, 2008, and that a MUI was opened into Schlumberger "two days later on January 30, 2008 (E151)." The trade date was actually January 23, 2008 (E42), and January 28, 2008 was the settlement date (E44). The OIG also failed to disclose that Complainant had sought and obtained clearance to sell the Schlumberger stock on January 18, 2008 (E41.)

[24] SLB's disclosure stated: "In July 2007, Schlumberger received an inquiry from the United States Department of Justice ("DOJ") related to the DOJ's investigation of whether certain freight forwarding and customs clearance services of Panalpina, Inc., and other companies provided to oil and oilfield service companies, including Schlumberger, violated the Foreign Corrupt Practices Act."

disclose the criminal probe in its Form 10-K filed on February 13, 2008 (E215-E217), and in its Form 10-Q filed on April 23, 2008 (E218-E220). The DOJ's FCPA investigation was also discussed in articles published by several news media. (E52-E56) Although the SEC's parallel civil investigation had not commenced or was not announced simultaneously, the same conduct underlay both investigations. DOJ criminal investigations are more newsworthy and arguably more material than civil investigations, and often followed by parallel SEC investigations. The FCPA investigation of SLB was public information when Complainant sold her odd-lot shares. Complainant's *purchases* of SLB stock in April 2008, aside from being financially ludicrous, similarly could not have been based on "inside information."[25]

c. *The OIG's Duplicitous "Finding" Concerning Complainant's Sale of United Health*[26]

Complainant sold 150 shares of United Health stock on January 30, 2006 (E58-E60), which settled on February 2, 2006, *at least two months before* an SEC attorney opened an investigation into United Health (E153) after having read a Wall Street Journal ("WSJ") article dated March 18, 2006 (E61-E68, E153). That article questioned United Health's accounting practice concerning stock options, and an attorney in Complainant's Assistant Director group opened a preliminary inquiry, called a Matter under Inquiry ("MUI"), into United Health on April 11, 2006.

No evidence suggests that *anyone* at the SEC had been anticipating the *WSJ* article or the consequential MUI. Only if Complainant were a soothsayer —and indeed, a successful one — could she possibly have known that when she sold this position, an SEC inquiry would be opened two months later. The OIG's "finding" that Complainant possibly could have illegally traded on *non-information* — instead of *nonpublic information* — defies logic.

d. *The OIG's False and Misleading Statements to Congress*

Despite knowing or having reason to know that its "insider trading" theory against Complainant was fatally flawed, the SEC IG and the other two signatories to the ROI may have violated 18 U.S.C. § 1001 by making false and misleading statements, orally and in writing, to Congress and the DOJ about Complainant's securities trading. In a hearing before the Subcommittee on Oversight and Investigation, Committee on Financial Services, U.S. House of Representatives, held on July 13, 2009, the SEC IG stated, in written testimony (E180-E181):

> Our investigation revealed suspicious conduct, appearances of improprieties, and evidence of possible trading based on non-public information on the part of two SEC Enforcement attorneys. Because of the seriousness of the information that our investigation uncovered, we referred the matter to the United States Attorney's Office of

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[25] If a trader *buys* stock *on the basis* of *material*, *adverse inside information* concerning the issuer, then the trader is knowingly *gifting* a portion of the purchase price to the seller of the stock. This *gifting* could never constitute a "fraud" on the recipient.

[26] ROI, pp. 43-44 (E152-E153.)

the District of Columbia's Fraud and Public Corruption Section, which, together with the FBI, is conducting an investigation of possible criminal and civil violations.

These statements also appear in the OIG's Semi-Annual Reports to Congress ("SARC") when the OIG stated that Complainant "potentially" violated insider trading laws by "potentially" trading on the basis of non-public information (E69-E71, E162-E165, E182-E187). All of these statements were false not only because non-public information must be material[27] to warrant insider trading,[28] but most fundamentally because the alleged non-public information was demonstrably public information at the time of Complainant's trades. Moreover, the SEC IG made these false statements to Congress even though Complainant's counsel had explicitly stated in a May 26, 2009 Wall Street Journal article that the information was public (E169-E171).[29] In addition to the SEC IG, the other two signatories to the ROI may have also violated 18 U.S.C. § 1001 since they signed the false ROI (E161), knowing or having reason to know that the false statements included in the ROI would be reported and submitted, and in fact were reported and submitted, to Congress and the DOJ.

e. *The OIG's Duplicitous Statements to the DOJ*

The OIG unjustifiably referred Complainant to the DOJ based on its "finding" of possible insider trading, even though, as noted previously, Complainant's counsel had put the OIG on notice in a May 26, 2009 Wall Street Journal article that the information was public. Its reporting of these baseless accusations to the DOJ constituted another abuse of power and waste of taxpayer money because it caused the DOJ to expend resources re-investigating Complainant, after which it determined that the OIG's allegations of insider trading were groundless.

3. The OIG's Duplicitous "Finding" That Complainant Violated Rule 5 by "Not Providing Proof of Clearance for Some Trades"

In the ROI, the OIG falsely claims that Complainant violated Rule 5 by not having proof of having cleared some trades. The ROI states:

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[27] Information is "material" when its disclosure would be "viewed by the reasonable investor as having significantly altered the 'total mix' of information made available," *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988), quoting *TSC Industries, Inc. v. Northway, Inc.,* 426 U.S. 438, 448-49 (1976), or is "reasonably certain to have a substantial effect on the market price of the security," *Elkind v. Liggett & Myers, Inc.*, 635 F.2d 156, 166 (2d Cir. 1980).

[28] The OIG's SARC for April 1, 2009 to September 30, 2009, states "The IG…described the findings of the OIG's report of investigation, which include …evidence of possible trading based on non-public information…" (E183-E187) The OIG's September 22, 2010 "Written Testimony of H. David Kotz Inspector General of the Securities and Exchange Commission," submitted to the U.S. Senate Committee on Banking, Housing and Urban Affairs," The SEC IG describes the ROI concerning Complainant, stating, "…[W]e have issued investigative reports regarding a myriad of allegations, including…improper securities trading by Commission employees…"(E195-E196.) To Complainant's knowledge, the OIG has not repudiated the false ROI in any public forum.

[29] This article on the front page of the business section of the *Wall Street Journal*. It defies credulity that the SEC IG and the other two signatories to the ROI somehow missed the sensational press coverage of their ROI in the WSJ.

> The OIG found that [Complainant] did not receive clearance for ten separate transactions during the two year period the OIG reviewed for this report. [Complainant] testified that it was her practice to seek approval from either CRST or the Ethics Office for each transaction, but that she did not keep a record of clearances she received from the Ethics Office. …[Complainant] does not have evidence that she received clearance to buy or sell those ten separate securities. Although our own check revealed that each of these transactions would have been cleared had she sought clearance at the time she wanted to conduct the transaction, she risked that these transactions would not have been cleared…."[30]

The OIG's deception here is creating two requirements that never existed. Rule 5 has never required that SEC employees to: (1) clear securities trades with the Ethics Office; or (2) provide proof of such clearances. The OIG's claimed basis for "requirement" appears in a prior undated Ethics bulletin that states: "[SEC] employees *should* check all proposed transactions using the CRST system (E120.)"[31] This suggestion was never codified in Rule 5. In any event, the OIG simply made up rules to find "violations."

4. The OHR's Failure to Disclose its Record-keeping Practices to the OIG and the DOJ's Investigation of Complainant's Possible "Falsification" of Forms 681

Under the SEC's former version of Rule 5, SEC employees who traded securities were required to file a Form 681, *Employee Report of Securities Transactions*, with OHR within five (5) business days after receiving confirmation of the trade. A Form 681 could show from one to seven, or more, employee trades.

While taking Complainant's testimony, one of the signatories to the ROI informed Complainant that the OIG lacked any record of the Forms 681 for thirty-six (36) of Complainant's 247 transactions. Complainant's counsel, who had produced Complainant's Forms 681 filed with the OHR to the OIG, later informed the ROI signatory that Complainant had produced copies of her Forms 681 for all but two transactions (E72-E74, E89-E106.)[32] Almost all of Complainant's Forms 681 have original stamps, or are initialed by OHR employees, or have proof of submission through electronic "read receipt" verifications, or have other evidence of submission, confirming their genuineness (E75-E88.) The OIG staff's comments suggested that the OHR, tasked with filing

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[30] ROI, p 22 (E131).

[31] Italics added. The CRST system showed whether stock was or was not blocked because the issuer had certain registration statements pending. As noted previously, the OIG found that Complainant had not traded when registration statements were pending. (ROI p. 22; E131)

[32] Complainant's counsel reviewed all of Complainant's copies of her Forms 681 to determine whether those securities transactions could be found. All of the Complainant's transactions were included in the Forms 681 that Complainant had filed with OHR, with the exception of two, which were for securities transactions in an exchange-traded fund (ETF) that had occurred in October 2006.

Forms 681, had not delivered some, most, or perhaps any of Complainant's Forms 681 to the OIG,[33] and apparently had not input into its separate database at least thirty-four of Complainant's trades that had been reported on Forms 681.[34] The ROI, which did not discuss OHR's record-keeping practices, "found that [Complainant had] filed SEC Form 681s [*sic*] for all those [247] transactions, except two (E129)[35], and did not raise any concerns about the authenticity of the Forms 681 Complainant had filed with OHR.

It appears that by late 2009, perhaps after the DOJ had realized the baselessness of the OIG's insider trading claims against Complainant, the OIG began pursing a new, baseless criminal theory against Complainant. This theory, unrelated to insider trading, appears to have been that Complainant had provided the OIG with *falsified* Forms 681, and thereby had obstructed justice.[36] What "justice" was supposedly obstructed is unclear since the OIG did not investigate or reflect any such concerns in the ROI, but the OIG may have concocted this fiction of falsified administrative forms to bring about *some criminal sanction* of Complainant, and thereby demonstrate that all of its smoke had finally found a fire. In any event, the DOJ unceremoniously closed the OIG's referral with no action.[37]

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[33] Complainant cannot locate in the OIG's investigative record any letter, memorandum or email of transmission from the OHR to the OIG concerning Complainant's Forms 681. The only Forms 681 included in the OIG's investigative record appear to be those that Complainant had provided to the OIG (Exhibits to the ROI, Volume IV of VI, Tab 27.) The only evidence of the OHR's transmission of Complainant's records to the OIG is an email dated March 18, 2008, from Victor Tynes, that attaches a spreadsheet entitled, "Annual Report of Securities Holdings For Employee 03/18/2008" (Exhibits to ROI, Volume VI or VI, Tab 98.) Given that the OHR demonstrably had failed to input some of the multiple trades reported on a single Form 681, the OHR cannot support any "finding" that Complainant had failed to file any Form 681, even the one for Complainant's two trades in October 2006. It also substantiates Complainant's belief that, in fact, the OHR lost or destroyed some, most, or perhaps all of Complainant's Forms 681.

[34] In some instances, the OHR input only one or several of the multiple trades that Complainant had listed on a given Form 681. A Form 681 dated January 17, 2006, showing OHR's hand stamp and initials, described four trades, yet the OIG's spreadsheet of Complainant's reports shows two as "missing" (E74-E76). In another instance, the OHR claimed not to have another Form 681, yet Complainant's copy was hand stamped on February 2, 2006 (E79). One Form 681, initialed by the OHR on February 15, 2006, reported six trades, yet the OIG claimed that the OHR was "missing" reports for five of six trades (E80). On a Form 681 that Complainant had submitted to the OHR on September 24, 2006, which reported three transactions, the OHR had input only two of the transactions (E81). At least two of the reports had "read receipts" by OHR (E86, E88). In effect, if the OHR had lost or destroyed the Forms 681 or improperly or incompletely entered information, the transaction was deemed "unreported." (E75-E88)

[35] The OIG must have realized the sloppy record-keeping by both the Ethics Office and the OHR, but did not investigate it.

[36] Complainant learned of this new theory of her purported criminal conduct in July 2010, after having received documents showing that the DOJ had subpoenaed her home email records based on her "suspected" violation of the obstruction of justice statute, 18 U.S.C. § 1519 (E188-E194).

[37] In response to the negative press generated by the OIG's baseless accusations against Complainant, the SEC implemented the Ethics Program System ("EPS"), a clunky software application that, *inter alia*, transferred to all SEC employees responsibilities for the record-keeping functions formally held by the OHR. In effect, employee time was transferred from mission-related work to internal book-keeping. SEC employees' securities trades must be now pre-approved through EPS.

5. The OHR's Deceptive Actions Against Complainant

a. *The OHR's "Finding" of "Insufficient Evidence" of Complainant's "Insider Trading"*

In her Letter(E1-E2), the OHR AD confidently asserts,"I find that there is insufficient evidence to find that you [Complainant] engaged in insider trading." This purported "finding" was not only unnecessary,[38] but it intentionally and misleadingly suggests the existence of evidence of insider trading against Complainant. The OHR AD does not, and likely cannot, identify the "evidence," nor does she explain why it is "insufficient." Complainant submits the "finding" is bogus, and not only because the OHR AD is not an expert, but because she could not have considered any "evidence," because none exists.[39]

If the OHR AD were qualified, and if she had reviewed several filings by the issuers (e.g., Citi, SLB, and United Health), she only could have concluded either that there is no evidence or that the evidence conclusively shows that Complainant *could not possibly* have engaged in insider trading. Had the OHR AD made such a finding, however, she and her employer, the SEC, would not be able to conceal the baseless and needless costs, both to the taxpayers and the Complainant, of the OIG's deceptive investigation and actions concerning Complainant before the public, Congress, and the DOJ.

b. *The OHR's Bogus "Finding" that Complainant Violated the SEC's Rules Concerning the Use of Office Equipment*

In her Letter (E1-E2), the OHR AD also "finds" that Complainant's "use of the SEC computer to execute stock transactions for [her] own personal gain was in violation of the SEC directive prohibiting this kind of use of SEC equipment and compromises the ability of the Commission to fulfill its mission." In support of this "finding," she quotes the following language: "*All use* of SEC network and automated systems, including accessing the Internet, intranet, and email, *must be consistent with this purpose* [of protecting investors and maintaining the integrity of the securities markets.]"[40] If this language applies to SEC employees other than Complainant, *all* non-mission-related use of SEC equipment — including use of SEC office equipment (or time) to seek outside employment, which is expressly allowed, and thereafter to solicit attendees to SEC farewell parties — would also be strictly prohibited.

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[38] Complainant had never been charged by any entity, civilly or criminally, with having violated the insider trading laws. The only "charge" was the OIG's self-serving and false innuendo, or false "finding" of possible insider trading. Given the lack of credibility of the OIG's bogus "finding," the OHR AD could have easily found "insufficient evidence" of insider trading by every SEC employee.

[39] The OHR AD is not competent to make a "finding" concerning Complainant's alleged insider trading because she is not an expert on the law of insider trading and because no proceeding took place. Complainant submits that no "finding" can be based on a record created with no due process.

[40] Italics added.

Given this omnibus prohibition, the OHR AD need not have referred to any less encompassing restriction on the use of SEC equipment. She does, however, refer to Rule of the Road #1, a provision that is not among those included in the ROI:

> DO NOT use SEC IT resources for commercial purposes; for *personal financial gain*, or in support of "for-profit" activities (e.g., consulting for pay, sales or administration of business transactions, selling real estate, operating a private photography business or the sale of goods or services.[41]

According to the OHR AD, Complainant's execution of securities trades was undertaken for personal financial gain, and therefore fell within this less-restrictive language.[42] Thus, although SEC employees were and are *required to use SEC office equipment concerning almost all aspects of securities trading, i.e.,* (1) to input personal financial data for the OGE Forms 450; (2) to request permission to execute securities trades, formerly suggested and now required; and (3) to input transaction information onto Forms 681 (formerly) or into the labyrinthine Ethics Program System (now), the use of SEC equipment for the execution of a securities trade itself, at least for Complainant, was and remains prohibited. According to the OHR AD's interpretation of the SEC's rules, Complainant could only have *executed* securities trades by bringing her own telephone or computer to work, even though she would have to use SEC equipment to request clearance to trade and to report the trade in the SEC's records.

The OHR AD's Letter also studiously and deceptively ignores the provisions of SECR 24.4-3 entitled, "Use of SEC Office Equipment (E9-E16 at E10, E14)," as these provision are inconsistent with her interpretation. SECR 24.4-3 contains the general limited personal use exception, upon which Complainant justifiably relied, which specifically allows employees to use SEC office equipment to "check" Thrift Savings Plans "or other personal investments." (E10, E14) Complainant submits that "checking" would include not merely the value of securities holdings, which could have been but was not specified in the provision, but also to execute trades, particularly given the SEC's time-consuming requirements concerning trades. Complainant justifiably relied on this provision in executing some trades using the same SEC equipment she used to seek, clear and record trades.[43]

CONCLUSION

The OIG has a power that can be used and has been used abusively. It has targeted SEC

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[41] *Id.*

[42] The primary theory of the OIG's "finding," even though he did not articulate any such theory, would have been that Complainant sold certain stocks to avoid or minimize stock *losses*. The OIG made no mention of this standard terminology, "loss avoidance;" and the OHR AD made no finding about Complainant's timing or reason for her trades, or whether they were supposedly to realize gains or to avoid (further) losses.

[43] The absolute ban, and therefore the exception to the limited personal use exception, is against using SEC office equipment maintain or support personal or private business. The OHR AD deceptively attempts to characterize the execution of a securities trade as under this private business prohibition.

employees who have no due process and cannot refute or address abuses of that power. The OHR AD is simply an instrument of this abuse, as its "proposals of discipline" are mandatory, whether warranted or not.

The OIG's false and malicious ROI concerning Complainant is a public document, available on the Internet, and the OIG's false accusations continue to receive press attention. The Letter against Complainant appears to be a vehicle to pander to the public demand for "justice" for Complainant's supposed "wrongdoing" (E197-E214.) The OIG's arrogance, self-interest, and fraudulent and abusive investigative practices have caused SEC employees to fear the OIG's false allegations and retaliations, which has destroyed the morale of many SEC employees. More troubling is the prospect of any inspector general, like the SEC IG, obtaining subpoena power.

This Letter is the most recent action in a series of Deceptive Actions against Complainant, with the result that Complainant has had no recourse or due process to address these false and malicious claims before the SEC or the public. No adequate procedures exist to review the OIG's work for accuracy, competency, or integrity before it is publicly disclosed, or to provide *any* due process to SEC employees when lapses in integrity are evident. For these reasons, Complainant requests that CIGIE adopt and implement procedures similar to the SEC's Wells process to provide SEC and other federal employees with at least that amount of due process accorded to those who may have violated the federal securities laws by misappropriating millions of dollars in investors' funds.

RELIEF REQUESTED

Based on the foregoing, Complainant requests that CIGIE:

1. Institute procedures allowing SEC and other federal employees to have at least minimal due process to respond to OIG investigative reports before they become public;

2. Require the SEC OIG to rescind, retract, expunge, and repudiate from the record the OIG's fraudulent ROI; and

2. Require the SEC OIG to issue a Letter of Exoneration, which includes a public apology from the SEC OIG to Complainant for the OIG's unfounded, deceptive, and malicious ROI that defamed and continues to defame Complainant, and place it permanently in Complainant's personnel file.

Respectfully submitted,

/s/ April 5, 2011

NANCY E. McGINLEY, *Complainant* DATE