

September 22, 2011

Hon. Spencer Bachus, Chairman
Hon. Barney Frank, Ranking Member
Committee on Financial Services

Hon. Darrell E. Issa, Chairman
Hon. Elijah Cummings, Ranking Member
Committee on Oversight and Government Reform

Hon. Randy Neugebauer, Chairman
Hon. Michael E. Capuano, Ranking Member
Subcommittee on Oversight and Investigations
of the Committee on Financial Services

Hon. Patrick T. McHenry, Chairman
Hon. Mike Quigley, Ranking Member
Subcommittee on TARP, Financial Services and Bailouts of Public and
Private Programs of the Committee on Oversight and Government Reform

RE: Joint Subcommittee Hearing on “Potential Conflicts of Interest at the SEC”
(Thursday, September 22, 2011, 2 pm, 2128 Rayburn HOB)

Members of Congress:

We are senior members of the private securities bar. We write in support of David Becker and to raise several points that we feel are important for you to consider.

Importance of Ethics Compliance. We will begin by applauding your efforts to assure and enhance compliance with ethical requirements at the SEC and across government. We likewise applaud the SEC’s ongoing efforts to improve its operations and in particular its internal procedures to enhance ethical behavior and compliance. Our comments below are limited to matters relating to your consideration today of David Becker and the role he played at the SEC as it tried to work its way through the wreckage of the Madoff tragedy, which began with Madoff’s December 2008 confession to having perpetrated a colossal fraud that tricked investors, multiple regulators and the financial services industry participants who dealt with him daily.

We understand all that has been said, rightly, about avoiding even the “appearance” of a conflict of interest, even where no actual conflict exists. And we all wish that – in the heat of battle in dealing with Madoff and numerous other crisis issues – more attention had been paid to these issues, and that we did not have to consider what is before the subcommittees at this time.

Evaluating David Becker. With the foregoing acknowledged, we agree with SEC Chairman Mary Schapiro’s public statement yesterday afternoon that David Becker is “a talented, highly skilled lawyer and a dedicated civil servant.” In similar vein, we agree that Chairman Schapiro correctly commented in February, on David’s departure from the SEC, that “David’s wise counsel has guided the Commission through a gauntlet of complex legal

and policy issues. His experience and deep knowledge of the Commission and the securities laws has served the agency and the American people brilliantly.”

Many of us have worked for years with David, both in senior SEC positions and in private practice, on a wide variety of legal matters. We have also worked with him on bar committee matters. Based on our long-term and detailed observations, David has consistently shown himself to be of the highest moral and ethical fiber and a strong advocate for justice and the public interest.

David is one of the most talented lawyers of his generation. After starting his legal career as the editor-in-chief of the Columbia Law Review and then as a law clerk for Supreme Court Justice Stanley Reed, he spent decades as a valued securities law counselor and senior partner at two of our country’s top law firms. The SEC was indeed fortunate to have a lawyer of David’s mettle and caliber perform not one but two periods of public service at the agency. Between 1998 and 2002, he served the SEC first as Deputy General Counsel and later as General Counsel. He then returned for a second tour of duty as General Counsel from 2009 until 2011, the period here under consideration.

Involvement in Madoff Deliberations. When Mary Schapiro took the helm as SEC Chairman, we were facing the worst financial crisis in 80 years. She wisely realized that the SEC would need to respond effectively to the crisis and work with Congress on difficult and complex legislative and rulemaking proposals. Recognizing that this was a time when a person of broad experience in SEC and private practice would be needed to serve as the SEC’s chief legal officer, Chairman Schapiro approached David and asked if he would consider returning to the SEC as General Counsel.

Any suggestion that David acted for personal gain, instead of in the interests of the investors victimized by Madoff, frankly makes no economic sense whatsoever. Saying yes to Chairman Schapiro’s request that he return to the SEC would mean that David would lose millions of dollars, representing the difference between his senior law firm partnership income and what would be his government pay. Nor would the job give him any new resume credential, as he had previously been SEC General Counsel and was already acknowledged as one of the leading securities lawyers in the country. Yet at considerable financial sacrifice to himself and his family, David said yes and returned to the SEC as General Counsel.

The current debate has focused on the SEC’s position on whether or not Madoff victims should be compensated with just the return of their invested principal or whether they should also get a basic interest-like payment as well. Notably, however, the SEC did not oppose the Madoff trustee’s separate determination that Madoff victims should not retain so-called “phantom profits” – the amounts that the victims thought they had made as income from Madoff’s investment program on the amounts they had originally invested. The SEC not opposing the trustee’s phantom profits point was obviously substantially against David’s personal financial interests and had a much greater impact than any basic interest payment to Madoff victims might have had for David.

As has been publicly acknowledged by all involved, David immediately disclosed his mother’s investment with Madoff on returning to the SEC and got ethical clearance to participate in Madoff-related discussions. He told Chairman Schapiro that his mother had invested, and received the ethics opinion that he would not have to recuse himself from

Madoff-related deliberations. It is acknowledged that at least five other senior SEC officers knew of his mother's investment.

Finally, many of us are former SEC senior officers or staff, and based on our many years of experience at and with the agency, we can affirm that any significant SEC decision receives broad consideration. Sometimes 20 or more sets of eyes will fall on a single recommendation memo, and decisions by the five SEC commissioners are usually made in a large meeting room that is packed with very experienced and intelligent senior and junior staff members. In that environment, any views perceived as being contrary to the public interest are quickly and vigorously challenged and ultimately disregarded.

* * *

In conclusion, we urge that David Becker's considerable contributions to the SEC and our nation be recognized and that the points we have raised above be considered as part of your deliberations. Thank you for your consideration of this letter.

Very truly yours,

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