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Report inadvertently opens window into SEC's operations

by **Richard E. Brodsky**

The Office of Inspector General of the Securities and Exchange Commission has issued a report criticizing the Miami regional office's handling of an investigation involving Bear Stearns. Briefly, after extensive in-house delays, the office decided not to recommend that the SEC bring an action even though several proposed defendants had already agreed to monetary settlements.

The report was both engrossing and revealing — but not for the reasons highlighted by the OIG and some press outlets.

The “headline” of the report is the suggestion that the head of the Miami office decided to close the case because he used to work with the lawyers who represented targets of the investigation. It is inconceivable to me that such a relationship, or any improper motive of any kind, had anything whatsoever to do with the decision to close the case. Sometimes — maybe even often — members of the SEC staff are wrong, but they are not corrupt.

The report also emphasizes that line-level staff persons,

after conducting the investigation, strongly believed that there were grounds for enforcement action and were shocked that the case was closed without action. This is a tempest in a teapot. The job of the senior staff is not to rubber-stamp their subordinates' proposed recommendations. It is to ensure that cases are provable and worthwhile exercises of scarce commission resources. I can attest that it is possible, through a discussion of the law and the facts, to convince the staff not to “go to the commission” with a recommendation. In no way could those results be deemed to be the result of influence-peddling or improperly motivated judgments by the staff. While in this case there appears to be some confusion as to exactly why the case was dropped, the fact that senior staff members in Washington, D.C., approved the decision not to bring the case weighs, in my mind, in favor of that decision.

With all this said, however, the OIG report is still an extremely valuable document — not because it (unconvincingly) suggests corruption or even an appearance of unethical conduct, but rather

because, sadly, it reveals common occurrences within the SEC enforcement process. Anyone who has ever worked at the SEC or has dealt with the SEC can tell similar tales of interminable delays, of failures to follow up leads, and worse. Staff lawyers sometimes are not adequately trained. Cases sometimes stall on supervisors' desks. Obvious leads that could lead to exoneration of targets are sometimes not pursued. Staff investigators' reports on the results of investigations are often not reviewed carefully to make sure that the facts are as they are portrayed or supported by sufficient evidence, with the result that critical decisions affecting people's lives can be made on the basis of mistaken, or even false, assumptions or inadequate evidence.

In this very case, it appears that lengthy internal delays may have played an important part in deciding not to proceed, even after some parties had agreed to settlement. The delays may have been costly, indeed, but the mere fact that some people agreed to settlements does not, per se, prove that the case was worth bringing. True, sometimes people

or entities settle because they know if they litigate they will lose. But people settle cases with the SEC all the time even when there is a substantial possibility of prevailing in litigation — to get on with their (personal or corporate) lives, to avoid repeated negative publicity, and, most of all, to avoid the staggering expense of prevailing at trial.

One can hope that the commission's and the staff's reaction to this case is not to focus solely on the spurious charges of conflict. Rather, the focus should also be on whether the situations like those described in the OIG report are everyday occurrences.

It is no answer for the commission or its staff to shrug this case off with bromides like “we try hard” and “we mean no harm” and “we are understaffed.” No one in the know doubts that the commission and its staff, virtually to the last man or woman, are dedicated, intelligent and well-meaning. And certainly the SEC, seven years after Enron, remains understaffed. (Read the recent report of the OIG on the commission's handling of the regulatory oversight ■