

# **EXHIBIT 3**

**MORVILLO, ABRAMOWITZ, GRAND, IASON, ANELLO & BOHRER, P.C.**

**SUBMISSION ON BEHALF OF MEAGHAN CHEUNG**

**INTRODUCTION**

Until he confessed in December 2008, Bernard Madoff had perpetuated a fraud since at least the early 1990s, if not earlier. For many years he deceived sophisticated and experienced market professionals and investors, as well as many lawyers and investigators from the SEC. The SEC's enforcement division investigated a Madoff-related fraud in 1992, without uncovering the Ponzi scheme. Likewise, the Office of Compliance Inspections and Examinations (the "inspections division") failed to discover the fraud during examinations of Bernard L. Madoff Investment Securities ("BLM") in 1999, 2004, and 2005. Meanwhile, Harry Markopolos submitted complaints to the SEC's Boston office in 2000 and 2001, apparently to no avail.

In late 2005 and into 2006, Ms. Cheung and a group of SEC employees conducted an enforcement investigation into allegations of wrongdoing at BLM. These employees immediately, seriously, and diligently pursued Mr. Markopolos's third complaint to the SEC. Unfortunately, Madoff misled them as he had previous SEC employees and countless investors (including those that were contacted during the investigation). Indeed, Madoff's lies during his May 19, 2006 SEC testimony formed the basis for one count to which Madoff pleaded guilty in 2009.

As a talented and conscientious SEC lawyer, the failure to uncover Madoff's crime is a burden Ms. Cheung carries daily and will continue to carry for years to come. However, as we demonstrate in this Memorandum and as is apparent from Ms. Cheung's

testimony, Ms. Cheung and the others working with her conducted a meaningful and good faith investigation consistent with SEC rules, policies, and practices.

Ms. Cheung and her colleagues have already been the subject of, we submit, unfair public criticism. The public impression so far — created as a result of heated press coverage and rapid-fire congressional hearings — of inept SEC officials not caring enough about investors, is not borne out by the record of the enforcement investigation conducted by Ms. Cheung and her colleagues. The public — and those who care deeply about the future of the SEC and its distinguished enforcement division — anxiously await the Inspector General's report. It is the appropriate forum through which to present a fair and balanced review of why Madoff's crimes were not detected. If that report is read as another attack on the competence or integrity of Ms. Cheung and her colleagues, they will be unfairly blamed for what appears to have been a systemic failure. Such a report would also subject Ms. Cheung to a wholly unwarranted second round of public criticism deeply affecting the ability of a dedicated and conscientious former public servant to obtain future employment, and permanently tarnishing her reputation. We urge you not to permit that to occur.<sup>1</sup>

#### **MS. CHEUNG'S BACKGROUND**

Ms. Cheung's education and career exemplify her talent and dedication to public service. She graduated from Yale University and Fordham Law School. As a law student, Ms. Cheung worked extensively as a volunteer, with a particular focus on welfare and housing law. During her third year in law school, while at Northern

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<sup>1</sup> Ms. Cheung testified and we prepared this submission without viewing any contemporaneous documents other than those shown during Ms. Cheung's testimony or otherwise released to the public. Ms. Cheung testified to her best recollection without being able to review emails and other documents in preparation for her testimony. We also are doing the best that we can to prepare a complete submission without having the substantial benefit of access to those documents.

Manhattan Improvement Corporation providing free legal services in Washington Heights, Ms. Cheung decided to apply to the SEC to pursue a career in an area of the public interest that appealed to her. Ms. Cheung worked for ten years at the SEC, from 1998 to 2008, rising to the level of branch chief. She departed to spend more time with her two young children.

At the beginning of her career at the SEC, Ms. Cheung was a law clerk and then staff attorney. At any given time, she worked on three to four active cases. Her success in handling cases as a staff attorney make clear that she did not shy from taking on the prominent. They include the SEC's first enforcement action related to pro forma financial disclosures (Trump Hotels & Casino Resorts Inc.), and an action concerning one of the most extensive financial frauds at a public company (Adelphia Communications Corp.). Ms. Cheung was promoted to branch chief in or around early 2005, after which she continued to work on an investigation into Deloitte & Touche's Adelphia audit. She also worked on an action involving Citigroup's asset management division. These were high profile cases, garnering settlements totaling close to \$1 billion.

#### **THE NEW YORK REGIONAL OFFICE INVESTIGATION**

We believe that a fair review of the record of the enforcement investigation conducted by Ms. Cheung and others in the New York Regional Office demonstrates the following:

- Ms. Cheung and her colleagues immediately acted upon Mr. Markopolos's complaint and rapidly investigated it — unlike other occasions when his complaints were apparently ignored;

- Ms. Cheung and her colleagues utilized specialized personnel to look at complicated trading issues;
- Ms. Cheung and her colleagues appropriately relied on other departments, in particular the inspections division, which had recently conducted an on-site exam of Madoff's broker-dealer operations;
- Ms. Cheung and her colleagues were hamstrung by a lack of resources and personnel and the lack of responsiveness of other offices within the SEC that could have assisted in the investigation;
- Madoff's reputation and connections in no way affected Ms. Cheung and her colleagues' decision to investigate and the handling of the case;
- Constraints on the operations of the SEC enforcement staff — which does not have investigative agents such as the FBI and must maintain confidentiality — may make it difficult for it to identify Ponzi schemes when there are no investor complaints (or the inspections division does not raise a flag). This particularly is so when a leading investor (namely Fairfield Greenwich), claims not to have any concerns.

Some of these findings are contrary to the public impression that has developed since Madoff's crimes were revealed. Some of these findings may help in improving the SEC's practices going forward. All of them, however, support a conclusion that Ms. Cheung and her colleagues acted appropriately, even if they did not successfully uncover Madoff's crimes.

## I. Steps Taken During the Investigation of BLM

As soon as the complaint from Mr. Markopolos was assigned to Ms. Cheung, she and her New York enforcement colleagues immediately began investigating the allegations of wrongdoing. At the direction of her superiors, Associate Regional Director Andrew Calamari and Assistant Regional Director Doria Bachenheimer, Ms. Cheung put together a well-qualified team to conduct the investigation with her — Simona Suh and Peter Lamore. Ms. Suh was considered a “rising star” in the SEC, and the best attorney in Ms. Cheung’s branch.<sup>2</sup> Mr. Lamore, an examiner with a substantial trading background who had recently been on site at BLM during an inspection examination, was also assigned to the investigation. Like Ms. Suh, Mr. Lamore had an outstanding reputation at the SEC. Robert Sollazzo in the inspections division stated that Mr. Lamore was one of the most knowledgeable examiners and could work through any trading issue. See Exhibit 32. Throughout the course of the investigation, Ms. Bachenheimer, Ms. Cheung, and Ms. Suh relied on Mr. Lamore for trading expertise and knowledge about BLM’s business.

Ms. Cheung and her team wasted no time investigating the allegations. Ms. Cheung recalls reviewing Mr. Markopolos’s 21-page complaint, as well as the Barron’s article and MAR/Hedge article, immediately following receipt of the referral. Ms. Cheung’s initial impression was that the allegations in the complaint were significant and well worth investigating. Because an SEC inspection team, which included Mr. Lamore,

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<sup>2</sup> Ms. Cheung did not review any email during her testimony that changes her opinion regarding Ms. Suh’s competence at the time of the BLM investigation. The Inspector General suggested that one email chain exemplified Ms. Suh’s general confusion. In that email chain, which did not include Ms. Cheung, Ms. Suh sent Mr. Lamore a non-legal trading question and in a self-deprecating manner commented that his answer showed how little she knew. See Exhibit 37. While Ms. Suh surely was not a trading expert (none of the attorneys in Ms. Cheung’s branch were), this comment does not reflect an inability on the part of Ms. Suh. If anything, this email shows that Ms. Suh knew when to ask for assistance.

recently concluded an examination of BLM, the enforcement team inquired about the inspection team's opinion regarding Mr. Markopolos's allegations. Members of the team, including Mr. Lamore, reviewed Mr. Markopolos's complaint and advised that most of Mr. Markopolos's allegations had been disproved by the prior examination. In particular, on November 4, 2005, at the outset of the investigation, Ms. Bachenheimer forwarded to Ms. Cheung, Mr. Calamari, and Ms. Suh an email from Mr. Sollazzo noting that Mr. Markopolos's complaint concerned issues similar to those previously investigated by the on-site inspection team. See Exhibit 10. In a November 14, 2005 email chain involving Mr. Lamore and William Ostrow (whom we believe was the branch chief who supervised that examination of BLM), Mr. Lamore stated to Ms. Cheung and Ms. Suh that most of the allegations from Mr. Markopolos's complaint could be refuted based on the prior examination. See Exhibit 12. The inspection team assured the enforcement team that BLM did execute trades. Indeed, Mr. Ostrow commented that what Mr. Markopolos did not know is that the trades were done in Europe. Id. Because the execution of trades is inconsistent with the operation of a Ponzi scheme, this assurance contradicted Mr. Markopolos's core allegations.

The investigative process proceeded as follows: Ms. Suh with assistance from Mr. Lamore drafted document requests which were reviewed by Ms. Cheung. The documents received in response to the requests were reviewed carefully by Ms. Suh, again with the assistance of Mr. Lamore. Ms. Cheung and her colleagues would decide whom to interview or depose. Witness outlines were prepared by Ms. Suh and reviewed by Ms. Cheung and Mr. Lamore. Ms. Suh was the lead questioner at an interview or deposition, but Ms. Cheung and Mr. Lamore also participated in the questioning. Ms.

Cheung, Ms. Suh, and Mr. Lamore met frequently to discuss the progress of the investigation. And they regularly discussed the investigation with Ms. Bachenheimer.

Soon after the initial review, the enforcement team decided to send a document request to Fairfield Greenwich, BLM's largest investment advisory client. Mr. Lamore advised on the substance of the document request. Ms. Cheung recalls that Fairfield Greenwich complied with the document request.<sup>3</sup> Ms. Cheung, Ms. Suh, and Mr. Lamore interviewed Amit Vijayvergiya from Fairfield Greenwich. Thereafter, a document request was sent to BLM, and documents were received in response to that request as well. After reviewing the documents produced by BLM, testimony was taken from Jeffrey Tucker of Fairfield Greenwich, Frank DiPascali of BLM, and Madoff. All of this work was done within six months of the initial complaint.

Significantly, the enforcement team was assured by Fairfield Greenwich that it conducted regular audits of Madoff's operations and that it had confirmed that Madoff had maintained custody of the funds entrusted to him. Likewise, Madoff stated under oath that he conducted equities and options trading in Europe. This false assertion would later be one basis for Madoff's perjury charge.

Ms. Cheung and her colleagues sought the assistance of the SEC's Office of Economic Analysis ("OEA"), but OEA's response, as documented in emails, was slow and ultimately unhelpful. They considered enlisting the assistance of the Office of International Affairs ("OIA"), but based on experience with and the reputation of the OIA, they decided that would not be productive.

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<sup>3</sup> From the documents shown during Ms. Cheung's testimony, it appears that the enforcement team also sent a document request to Tremont, although Ms. Cheung does not have a specific recollection of dealing with Tremont.



Ultimately, the New York Regional office decided to close the investigation, determining that BLM was an Investment Advisor and must register as one with the SEC. Viewed from the perspective of Ms. Cheung and her colleagues at the time, this was a positive development for law enforcement. Mr. Markopolos and both 2001 news articles complained that BLM's advisory activities were covert, but following the 2006 investigation — resulting in BLM's registration as an Investment Advisor — BLM's investment advisory business could no longer go unnoticed. BLM would be regulated by the extensive provisions of the Investment Advisors Act of 1940 (the "Act"). For example, BLM would have to file an annual report focusing exclusively on its investment advisory activities, which would preclude BLM from conflating its two lines of business.<sup>4</sup> 17 CFR § 279.1. Madoff and his company would have specific record keeping requirements, the Commission could require an accounting, and the Commission could require a written statement under oath whenever there was a suspicion of a violation of the Act.

BLM's investment advisory business would also be subject to continued on-site inspections. Indeed, Ms. Cheung — apparently erroneously — believed an examination of BLM's investment advisory business would occur within one year of registration. Based on Lori Richards' January 27, 2009 testimony before the United States Senate Committee on Banking, Housing and Urban Affairs, 14% of registered Investment Advisors were inspected in 2008 with certain high risk Investment Advisors given priority. According to Ms. Richards's description of priorities, BLM should have been considered high risk, making it more likely to be inspected, because BLM sold products

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<sup>4</sup> Prior to the new registration, Madoff was able to conceal his investment advisory business behind the cloak of his legitimate market-making business.

or services other than investment advice to its advisory clients and had custody of advisory clients' money and/or securities. Madoff may have worried about the increased scrutiny his company would receive due to this new registration, because he strongly resisted the New York regional office's conclusion that his firm register as an Investment Advisor.

Shortly after the decision to register BLM as an Investment Advisor, Ms. Suh went on maternity leave. Soon thereafter, another attorney in Ms. Cheung's branch left for maternity leave. As a result, Ms. Cheung's branch had just a single staff attorney. In addition to covering for absent staff attorneys, much of Ms. Cheung's time was spent working on non-enforcement projects, especially the delinquent debt project.

In November 2007, more than one year after the decision to conclude the investigation, Ms. Suh prepared a case closing recommendation that Ms. Bachenheimer and Ms. Cheung reviewed and approved. The recommendation noted the voluntary cooperation by BLM and two of BLM's largest hedge fund clients, and stated that the staff found no evidence of fraud. The case closing recommendation also documented the staff's determination that BLM acted as an unregistered Investment Advisor and that Fairfield Greenwich's disclosures did not adequately describe BLM's advisory role. Both BLM and Fairfield Greenwich agreed to, and did, remedy these problems.

In sum, Ms. Cheung and her colleagues recognized the seriousness of the Ponzi scheme allegation made by Mr. Markopolos. She and her colleagues developed a plan to investigate those allegations by initially obtaining documents and testimony from Fairfield Greenwich — the main feeder fund to BLM — and from BLM and Madoff. And that plan was implemented and followed. It would be wrong and unfair to conclude

that Ms. Cheung and her colleagues did not seriously investigate the Ponzi scheme allegations.

## **II. The Scope of the Investigation**

An objective review of why the SEC did not discover the Madoff Ponzi scheme must consider the reality that government officials with limited personnel and monetary resources must make judgments as to what steps should be taken in conducting an investigation. In 2005 and 2006, Ms. Cheung's branch had few attorneys assigned to it, had an extensive case load, and numerous other responsibilities. In particular, the delinquent debt project, frequently emphasized by SEC administrators during that period, greatly taxed enforcement resources. In deciding to conclude the BLM investigation, Ms. Cheung and her colleagues were aware of the following:

1) An SEC inspection team had recently conducted an on-site examination at BLM. Ms. Cheung understood that the inspectors would have examined trading records — the existence of which is inconsistent with a Ponzi scheme. The enforcement team also reviewed the inspection report which did not include evidence of a Ponzi scheme. Moreover, the enforcement team solicited the opinion of the inspection examiners regarding Mr. Markopolos's allegations. In the November 14, 2005 email from Mr. Ostrow to Mr. Lamore, Ms. Cheung was advised that Mr. Markopolos's complaint reflected his unawareness that BLM trading occurred in Europe, which undercut several claims seemingly predicated on U.S. trading.

2) Ms. Cheung and her colleagues obtained documents, an interview, and testimony from the largest feeder fund to BLM, Fairfield Greenwich. While the information obtained raised questions as to whether BLM should be required to register

as an Investment Advisor, it did not suggest the existence of a Ponzi scheme. In fact, the sophisticated principals of Fairfield Greenwich trumpeted their extensive due diligence of BLM and their confidence in BLM.

3) The existence of a Ponzi scheme can be revealed because the entity perpetuating the scheme does not have trading records or the victims of the scheme complain. The enforcement staff does not have investigative agents such as the FBI, but can rely on the work of the inspections staff. Here, Ms. Cheung believed that an SEC on-site examination had confirmed the existence of trading records, and BLM's largest client found no fault with Madoff and his firm. The assistance of other departments was also sought or considered but one, OEA, was unresponsive, and another, OIA, was known to be slow.

4) Ms. Cheung and her colleagues were also guided by the SEC's confidentiality policy, which limits the scope of an investigation. We respectfully suggest that the Inspector General not lose sight of the indisputable fact that public disclosure of an investigation, which inevitably occurs as more people are interviewed or deposed by the SEC, is unfair to the subject of that investigation until formal charges are instituted. Once charges are instituted public disclosure is, of course, necessary and the subject can defend itself in court. And all involved are assured that at that point the party initiating the action has appropriately concluded that charges should be brought. During the investigative stage none of that is true.

In light of the hideous fraud committed by Madoff, which has been publicly dissected with the benefit of hindsight, it is tempting to disregard the circumstances and principles existing during the SEC's 2006 BLM investigation. Understandably, it is

difficult to find much sympathy for any considerations that prevented the discovery of Madoff's crime. But in late 2005, as responsible government employees conducting an enforcement investigation, Ms. Cheung and her colleagues needed to make judgments based on resources and adhere to the principle of confidentiality.<sup>5</sup>

### **III. Issues Raised by the Inspector General's Questioning of Ms. Cheung**

During the testimony of Ms. Cheung, the Inspector General pursued lines of questioning from which we infer specific concerns. In this section we address those issues.

#### **A. Madoff's Response to the Investigation**

The Inspector General's questioning of Ms. Cheung has suggested two issues relating to Madoff's honesty. The first was whether Madoff lied to the SEC inspection or enforcement teams and the second related to his production of documents.

Ms. Cheung simply did not believe that Madoff committed perjury. Nor does she recall that Ms. Suh or Mr. Lamore believed that he had done so. In retrospect, Madoff clearly did lie but there is no basis to fault Ms. Cheung for not realizing this at the time.

Further, while Ms. Cheung did believe that Madoff's response to a document request was not as complete as it should have been, Ms. Cheung viewed such a response as typical. In Ms. Cheung's experience, many people and entities read document requests too narrowly. The SEC staff frequently had to persist in order to obtain all relevant documents. Ms. Cheung did not view Madoff's responses as unusual, and thus, his narrow response did not provoke greater concern on her part.

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<sup>5</sup> Ms. Cheung and her colleagues did not fail to pursue the allegations against Madoff because of his position or influence in the securities business. During her SEC career, she diligently pursued individuals and companies with more influence than Madoff and BLM. The view of Mr. Markopolos and others that somehow SEC lawyers do not pursue influential targets because of fear for their ability to obtain lucrative jobs in the private sector is simply a myth.

**B. Providing Madoff with Advanced Notice of a Document Request**

The Inspector General expressed concern about a telephone call Ms. Cheung's colleagues made to Madoff that provided him with advance notice that the staff intended to send a document request to BLM. Such advance notice was considered desirable because it hopefully would expedite the electronic production of documents. Serving a document request without advance notice does not prevent the recipient of the request from destroying documents. Only a search warrant does that and, of course, the SEC does not have the power to obtain a search warrant, nor would it have had a legal basis to do so in this investigation. Moreover, the enforcement team had no reason or ability to expedite BLM's document production, in order to "surprise" Madoff. As a practical matter, recipients of document requests can easily delay a production for a few days or longer.

**C. Proceeding Without a Formal Order**

Ms. Cheung and her colleagues did not seek a formal order of investigation. As Ms. Cheung testified, the Commission as then constituted had made clear to the Staff that it would not approve formal orders unless the Staff could demonstrate that they had been deprived of documents because they were not able to issue a subpoena. Here, Ms. Cheung and her colleagues believed that they could obtain the documents and testimony needed to conduct the investigation without having the authority to issue a subpoena. There is no reason to believe that the investigation would have uncovered the Madoff fraud if the staff had obtained a formal order.

**D. Decision not to Interview Certain Industry Insiders**

The Inspector General questioned Ms. Cheung about the decision not to interview certain individuals mentioned in Mr. Markopolos's complaint. None of those witnesses could have reasonably been expected to provide evidence — facts upon which a case could be brought — as opposed to opinions consistent with those already set forth by Mr. Markopolos. The judgment of Ms. Cheung and her colleagues not to contact those individuals was entirely reasonable. Moreover, we submit that Ms. Cheung had proper instincts when she was taken aback by Mr. Markopolos's suggestion that she interview these people without counsel being present. While this may be an appropriate investigative technique for field agents — Mr. Markopolos to his credit appears to have made extensive use of such techniques in Europe and the U.S. during his own inquiries — it is inconsistent with the ethos and approach of the enforcement staff. Perhaps, this identifies a hole in staffing of the enforcement division, but we question whether it would be appropriate for enforcement staff attorneys to act as would investigative field agents.

**E. Efforts to Obtain Foreign Records**

The Inspector General inquired about the extent to which Ms. Cheung and her colleagues sought evidence from BLM's alleged European options trading counterparties. From the documents reviewed during Ms. Cheung's testimony and from her best recollection, it appears that some effort was made to obtain documents of foreign trading through the domestic affiliates of RBS Greenwich Capital and UBS. Ms. Cheung believed that seeking such documents through the SEC's OIA would be much too slow and burdensome, and an easier way was to contact the domestic affiliates of the foreign counterparties.

We cannot be certain why the effort to obtain the foreign records was not pursued. One possible reason is that given the scarcity of resources and the difficulty of obtaining such records, it made more sense at the time to reach a settlement requiring Madoff to register as an Investment Advisor subject to additional exams rather than to persist in an investigation which thus far had not uncovered evidence of a Ponzi scheme.

There was some suggestion in the questioning of Ms. Cheung that she alone decided not to pursue the foreign records and to conclude the investigation instead, contrary to the desires of others. It is inconceivable to Ms. Cheung that she would have prevented the pursuit of any evidence or halted the investigation over the objections of those with whom she was working. The decision to conclude the investigation was made jointly by those in the New York office responsible for the investigation.

**F. Ms. Cheung's Dealings with Mr. Markopolos**

The Inspector General questioned Ms. Cheung about her dealings with Mr. Markopolos. While Ms. Cheung took Mr. Markopolos's allegations seriously, she also found several reasons for caution.

First, Ms. Cheung recognized that Mr. Markopolos could inform the press about the SEC investigation. In each early conversation, Mr. Markopolos probed Ms. Cheung about the investigation. To Ms. Cheung, Mr. Markopolos seemed more interested in obtaining information than in providing it. Mr. Markopolos heightened Ms. Cheung's concern when, within one month of the initial referral, he expressed his intent to go to the press with information about the investigation.

Ms. Cheung had learned to be sensitive to disclosures and communications with the press during her time as a staff attorney. Hence, when Mr. Markopolos threatened to



notify the Wall Street Journal about the BLM investigation on December 1, 2005, Ms. Cheung quickly alerted Ms. Bachenheimer, as she was trained to do. See Exhibit 14. Emails released by Mr. Markopolos corroborate Ms. Cheung's suspicion about Mr. Markopolos's willingness to disclose information gleaned from Ms. Cheung. For example, in a December 5, 2005 email to Personal Privacy at Taxpayers Against Fraud, Mr. Markopolos indicated that Ms. Cheung is "an attorney by training but says she's pretty decent at accounting and headed up the Adelfia case for the SEC"; Ms. Cheung and a staff attorney were investigating BLM together; and the SEC had requested documents from BLM. See MARK 116-117. Likewise, the emails demonstrate that Mr. Markopolos was in contact with the Wall Street Journal.

Second, Ms. Cheung worried that Mr. Markopolos, like some other tippers, might be motivated by personal interests contrary to the public interest or to the integrity of the investigation. On one prior occasion, Ms. Cheung received a tip from a short-seller whom, she later discovered, submitted a baseless complaint for the sole purpose of trading on a target company's bad news.

The communications released publicly by Mr. Markopolos show that Ms. Cheung had good instincts. On October 18, 2005, Mr. Markopolos sent his "team" an email whose subject line read "Possible Madoff Plays for your Personal Accounts." See MARK 108-110. The email instructed the recipients about how to profit if a Madoff scandal went public. Id. Within approximately one week of sending this e-mail, in which he discussed how to profit personally from a Madoff investigation, Mr. Markopolos went to the SEC's Boston office to recommend an investigation of BLM.

Third, in addition to Ms. Cheung's concerns about the press and Mr. Markopolos's personal motivations, Mr. Markopolos's general comportment during the investigation compelled caution. Mr. Markopolos pushed for Ms. Cheung to disclose information about the investigation, while at the same time clearly expressing that he feared for his safety should he become too involved. Meanwhile, Mr. Markopolos disdained lawyers, which became apparent within weeks of the initial referral, when he advised Ms. Cheung to exclude lawyers from interviews and displayed disappointment that Ms. Cheung herself was a lawyer. Mr. Markopolos also transparently despised the SEC, which became evident when he gave up on Ms. Cheung and her team, threatening to go to the press instead, just after the investigation began. Mr. Markopolos's testimony before the House Committee on Financial Services and the emails he released document the derisive attitude that belied his so-called attempt at ongoing collaboration. See, e.g., Markopolos Testimony p. 32 ("I believe the one over-arching deficiency is that the SEC is a group of 3,500 chickens tasked to chase down and catch foxes which are faster, stronger and smarter than they are."); Id. p. 33 ("As currently staffed, the SEC would have trouble finding first base at Fenway Park if seated in the Red Sox dugout and given an afternoon to find it."); MARK 167, August 28, 2006 email from Mr. Markopolos to Frank Casey ("An SEC staff attorney can barely count to 21, and then only if they're male and smart enough to pull down their pants to find the extra digit."); MARK 254, August 24, 2007 email from Mr. Markopolos to Neil Chelo (noting that SEC employees are "morons" and are "so lame, I'll bet they don't even catch colds in the winter.").

Finally, underlying Ms. Cheung's concern was the SEC policy requiring confidentiality, as emphasized in Ms. Cheung's training and various restrictions on the

disclosure of information. A breach of the SEC's confidentiality regulations could have resulted in serious reprimand, as various reports by the Office of the Inspector General make clear. There are numerous SEC regulations emphasizing the importance of confidentiality. See, e.g., 5 CFR § 2635.703; 17 CFR § 203.2; and 17 CFR § 200.735-3(b)(7)(i). These same rules apply when dealing with complainants such as Mr. Markopolos. Perhaps these rules should be reformed to allow closer collaboration with individuals such as Mr. Markopolos, but that is a policy decision, with benefits and drawbacks, that Ms. Cheung was not empowered to make.

While Ms. Cheung was careful in her conversations with Mr. Markopolos, it is also incorrect and unfair to suggest that she refused to talk to him or to receive information from him. For example, in an email exchange in mid-December 2005, Ms. Cheung invited Mr. Markopolos to call her should he come to New York, as he had planned. MARK 99-100. Ms. Cheung testified that she has tried to understand why Mr. Markopolos has singled her out for criticism. She believes it may be because she declined to share information with him. Whatever the reason, it is apparent that Mr. Markopolos's belief that his complaints were being ignored by the New York office was simply not true.

### **CONCLUSION**

Ms. Cheung's team earnestly investigated BLM, made public his investment advisory business, and increased his regulatory scrutiny by requiring him to register as an Investment Advisor. The enforcement team did not uncover Madoff's fraud, but not for lack of diligence. The failure to uncover the Ponzi scheme was systemic. The responsibility for that failure rests with many institutions, including the SEC and the

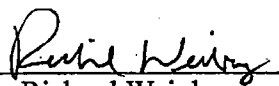
market professionals who entrusted their clients' money to Madoff. On numerous occasions the SEC had examined Madoff, revealing no evidence of a Ponzi scheme. And highly sophisticated feeder funds with the financial and personnel resources to conduct significant due diligence had entrusted billions of dollars to Madoff. Singling out Ms. Cheung and her group for blame would be most unfair.

In writing the Inspector General's report, we respectfully request that the Inspector General acknowledge that Ms. Cheung was a diligent and conscientious SEC attorney, who in complete good faith made thoughtful decisions regarding how to investigate the Madoff matter, and how to conclude that matter. She made those decisions in consultation with others at the SEC based on their collective judgment. Ms. Cheung and her colleagues were guided by the evidence they and others had previously uncovered, and the recognition that scarce resources in the bureaucracy of the SEC dictated that pragmatic choices had to be made.

Ms. Cheung's professional future is dependent on how the Inspector General's report is written. We trust every effort will be made to be fair to her.

Respectfully submitted,

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