

Chairman Ruder



OFFICE OF THE
GENERAL COUNSEL

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

May 16, 1989

CHAIRMAN'S OFFICE
MAILED

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Signed by:.....

The Honorable Edward J. Markey, Chairman
Subcommittee on Telecommunications and Finance
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Chairman Ruder has asked that I respond to your letter of May 5, 1989, which requests clarification of certain aspects of my May 2, 1989 letter concerning former SEC Chairman John S.R. Shad's activities as Chairman of the Board of Drexel Burnham Lambert Group, Inc. My May 2 letter states that, while nothing in federal post-employment law precludes Mr. Shad's appointment to Drexel's board, I intend to develop guidelines concerning the appropriate scope of contacts between Mr. Shad and the Commission.

Timing of Guidelines

First, you ask why the preparation of these written guidelines should, as my letter suggested, be delayed until after the entry of the final decree settling the Commission's litigation with Drexel. On May 2, the date of my letter, the Commission was seeking the appointment of a judge to whom the Drexel settlement could be promptly presented for entry. As I indicated in my letter, these efforts were necessitated by stays in the pending civil litigation seeking the recusal of Judge Milton Pollack, to whom the Commission's case is presently assigned. I did not, and do not, believe that the preparation of guidelines concerning Mr. Shad's contacts with the Commission should be a precondition to entry of the settlement, 1/ and, in order to avoid any possible suggestion that judicial consideration of the settlement should be delayed, my May 2 letter stated that I would develop the guidelines after entry of the decree.

1/ Mr. Shad is not mentioned in the proposed settlement, and his employment is thus not a condition of the settlement.

Since my May 2 letter, however, it has unfortunately become clear that the Drexel settlement cannot be entered in the immediate future. ^{2/} Accordingly, my staff and the Division of Enforcement are beginning the process of drafting the guidelines. The judicial obstacles to entry of the settlement, outlined in the margin, make it uncertain whether the guidelines will be completed before or after the decree is entered.

Judicial Consideration of Guidelines

In that connection, you also ask for "the rationale for not submitting the Shad 'guidelines' to the court in advance of its consideration of the settlement." (pg. 3) As noted above, the Drexel settlement is not contingent upon and thus will not be delayed pending the development of guidelines applicable to Mr. Shad. His obligations arise from Section 207 of the Ethics in Government Act and the Commission's related Conduct Regulation provision, not from the settlement. The proposed guidelines are merely a way of avoiding uncertainty in the future, for both the staff and Mr. Shad, concerning permissible communications.

^{2/} At the date of my letter to you, there was pending sub judice before Chief Judge Brieant of the United States District Court for the Southern District of New York a joint application, filed on April 27 by the Commission and Drexel, seeking the temporary assignment of a judge other than Judge Pollack, in order that the consent decree could be entered as soon as possible. This request was based on language in an order of the United States Court of Appeals for the Second Circuit, dated April 26, 1989, denying a similar joint motion. The Court of Appeals stated:

"A decision to assign the case, or any part of it, to another judge rests with Judge Pollack or with those responsible for the assignment of cases in the United States District Court for the Southern District of New York That decision does not rest with us."

On May 4, the Assignment Committee of the Southern District, chaired by Chief Judge Brieant, denied the request for a temporary new judge, pending action by the United States Supreme Court on the disposition of defendant Michael R. Milken's petition for certiorari from the Second Circuit's refusal to order Judge Pollack's recusal. The Commission filed its opposition to that petition on May 9.

In these circumstances, there would be no basis for submitting the guidelines to the court. Moreover, it is debatable whether a federal court would have jurisdiction to review proposed guidelines for avoiding a possible future violation of a federal criminal statute like Section 207, since there would be no current case-or-controversy concerning the issue. In any case, since Mr. Shad is not a party to the Drexel litigation and is not mentioned in the settlement agreement, I doubt that a court would undertake such an exercise, even if within its jurisdiction, in the context of approving the Drexel settlement.

Contacts with Mr. Shad

Finally, you question the propriety of "negotiating over the substance of those legal restrictions" (pg. 3) with Mr. Shad. In fact, my May 2 letter merely indicated that development of the guidelines would "necessarily entail discussion with Mr. Shad." (pg. 5) Mr. Shad will not influence my interpretation of the scope of Section 207 of the Ethics in Government Act. But, in order to craft workable and comprehensive guidelines applicable to the various practical situations in which Mr. Shad may have occasion to contact the agency, it would be beneficial to have his reactions concerning the likely occasions for contact. 3/

* * *

3/ Your letter also asks whether there is any precedent for such discussions and whether these contacts would be consistent with my view that Mr. Shad should not participate in the Drexel settlement discussions. The staff of this Office frequently discusses with former employees the application of the various post-employment restrictions to their work. The effort to produce written guidelines for the application of Section 207 to Mr. Shad's appointment to Drexel's Board is consistent with that practice. Moreover, I do not view the Drexel settlement and Mr. Shad's post-employment restrictions as the same "matter" for Section 207 purposes. If they were, no former employee could safely discuss with the Commission whether contemplated activities in the course of new employment were lawful.

The Honorable Edward J. Markey, Chairman
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I trust the foregoing is responsive to your inquiry. If you wish any further information, please let me know.

Sincerely,

Handwritten signature of Daniel L. Goelzer in black ink.

Daniel L. Goelzer
General Counsel

cc: ✓ Chairman Ruder
John S.R. Shad