

JOHN GARDNER BLACK

1446 Centre Line Road
Warriors Mark, PA 16877

June 9, 2009

Ms. Mary Beth Buchanan
United States Attorney
For the Western District of Pennsylvania
Suite 4000
700 Grant Street
Pittsburgh, PA 15219-1955

Dear Ms Buchanan:

Mr. John Gardner Black respectfully requests the Office of the United States Attorney for the Western District of Pennsylvania to move the United States District Court for the Western District of Pennsylvania to set aside Black's Indictment in the case of *United States of America versus John Gardner Black*, Case No. 99-203 because of a subsequent change in the law.

Currently Required Valuation Procedures

On December 30, 2008, the Securities Exchange Commission ["SEC"] supplied to the United States Congress a report in which it held that "Company-specific information should be factored into fair value measurement when relevant information is not observable in the market." In the matter of Devon, your office did not incorporate all company specific information when valuing the Collateralized Mortgage Obligation ("CMO"), CUSIP No. 31359EEN7. Had your office used the current fair value methods now required, the fair value of the CMO, derived using present value analysis would have supported the valuation supplied to clients in monthly statements and to the SEC auditors in August of 1997. The current regulations define an identical method to the one

employed by Petitioner in representing the fair value of both the CIA and the CMO to clients.

On April 2, 2009 the Financial Accounting Standards Board [“FASB”] issued and approved revisions to FASB Rule 157. When determining whether it is necessary to calculate the fair value of a security, a reporting entity must determine whether the security is actively traded. If the security is not actively traded, management is to presume a period of time for marketing the security which includes divulging all relevant company specific information as well as the solicitation of multiple bidders. The resulting value is to be derived using a present value technique, discounting to present value all of the expected cash flows. This is exactly the procedure used by Petitioner and supports his valuation of the CMO.

In addition to detailing the method of valuation for a security, FASB 157, supported by the SEC, holds that the fair value of a security may not be determined by obtaining a single bid. The SEC obtained a single bid from Lehman Brothers for the CMO without divulging to that bidder that an additional \$75 million of surplus value on other securities were pledged to support the CMO value, i.e., company specific information was not divulged to the bidder. No bids were solicited for the CIA’s. Had such bids been solicited for an ongoing enterprise, those bids would have exceeded the value Devon represented to its clients.

Background

On or about June 30, 1999, your office obtained a grand jury indictment of John Gardner Black. That indictment alleged that Black had committed Fraud by an Investment Adviser because he “...falsely represented the market value of the CIA (Collateralized Investment Agreement) as being equal to the remaining liabilities of Devon to the client.” [See: Indictment, Paragraph 62] This charge was never litigated. However, on January 24, 2000, your office entered into a joint stipulation of facts with

Black under which you stipulated that Black was not pleading guilty to misrepresenting the value of the CIA or of any asset owned by Financial Management Sciences [“FMS”]. Further, your office stipulated to the facts which, if used in a present value analysis, would value the CIA to be greater than the representations in monthly statements to clients.

On January 24, 2000, your office moved the district court to amend Black’s indictment by eliminating the charge of misrepresentation of the CIA’s market value. [See: January 24, 2000 Transcript, page 30, lines 21 to 25] The district court would then agree to the amendment and uphold the fact that the value of the CIA was not litigated between your office and Black.

On September 30, 2003, your office stated in a brief filed in district court that the CIA was “...not susceptible to independent evaluation”, implying that a valuation was never done or if done, the results were never released publicly nor to Petitioner. [See: Brief “Response in Opposition to Emergency Motion to Compel”, September 30, 2003, paragraph 1]

Instead of valuing the CIAs, as alleged in Black’s Indictment, your office stated in the September 30, 2003 brief that Black had “...misrepresented the value of the assets underlying the Collateralized Investment Agreements (CIAs), in collateral reports given to clients.” Despite numerous requests, to date, your office has not supplied to Black any valuation of any asset owned by Black’s company, FMS.

On December 13, 2005, the District Court issued an order in which it stated that it had “litigated and resolved” the market value of the CIA. Neither Petitioner nor his companies were represented in that litigation. However, it is reasonable to presume that the corporations were represented by the court appointed receiver, Richard Thornburg and, in defending the corporations, he would have argued that the CIAs were worth the value reflected in monthly statements, based upon a reasonable expectation of the present

value profits to be derived from all the investments owned by FMS, as required under Supreme Court opinion in *SEC v Howey*, 328 U.S. 293, 1946.

It can be further presumed that the Mr. Thornburg would have argued that company specific information, the estimated \$75 million of surplus value on the remaining investments owned by FMS, should be used to support the valuation of the CIAs or any other investment owned by FMS.

In analyzing the value of the CIA for monthly statements, Petitioner and his companies determined the fair value predicated upon a reasonable expectation of profits to be derived through the efforts of others and company specific information available to management, pursuant to FASB 157. That fair value was reported monthly to clients. A fair and accurate report of a security's fair value is not a violation of Sections 206(1), 206(2) or 206(4) of the Investment Advisors Act of 1940.

Black maintains, as he has for almost twelve years, that the CIA could have been sold at any time to any other investor, taxable or tax exempt, for the value represented to the CIA's owners as of September 26, 1997. However, the SEC did not solicit such bids.

Summary

Effective April 2, 2009, supported by the Securities Exchange Commission report to Congress of December 30, 2008, the valuation procedures followed by Petitioner and his companies for valuing the CMO are now required. Under those new regulations, the fair value of the CMO owned by FMS in 1997 was accurately presented to clients.

Further, your office, as you state, felt that the “CIAs were not susceptible to independent evaluation.” An indictment was obtained by your office without meeting the valuation requirements under *SEC v Howey*. It can be demonstrated that the fair value of the CIAs, under a reasonable expectations of profits test, pursuant to FASB Rule 157, was accurately represented in monthly statements. And, as stated above, the CIAs could have been sold at any time by any owner to any other party for the value represented in those monthly statements.

Therefore, Mr. Black respectfully requests the Office of the United States Attorney for the Western District of Pennsylvania to move the United States District Court for the Western District of Pennsylvania to set aside Black’s Indictment in the case of *United States of America versus John Gardner Black*, Case No. 99-203 because of a subsequent change in the law.

Respectfully Submitted,

John G. Black

Cc: Robert S. Cessar