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## United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

BRUCE A. COHEN, *Chief Counsel and Staff Director*  
MICHAEL O'NEILL, *Republican Chief Counsel and Staff Director*

August 3, 2007

The President  
1600 Pennsylvania Avenue, NW  
Washington, DC 20500

Dear Mr. President:

I am writing to express my concern about the Solicitor General's failure to file a brief that was requested by the Securities and Exchange Commission in *Stoneridge Investment Partners v. Scientific Atlanta*. The outcome of *Stoneridge* will also determine whether tens of thousands of Enron investors will secure a day in court. Earlier this year, the SEC voted to file an amicus brief in *Stoneridge* in favor of scheme liability, which is the same position the Commission has previously taken in similar cases in lower courts, including the Enron case. It has been reported that the Solicitor General did not file the brief, based on your views, and that the Solicitor General may actually file an amicus brief arguing the opposite position recommended by the SEC.

The SEC is an independent agency and its attorneys can represent the agency in trial courts and courts of appeals. The SEC, however, cannot represent itself at the Supreme Court of the United States—it must convince the Solicitor General to represent the SEC's position. Independence, when used to describe an administrative agency, connotes independence from the President and the ability to take positions or engage in actions that do not necessarily reflect the policies and views of the Administration.

Chairman Cox, in response to questions about the SEC's vote to file an amicus brief in *Stoneridge*, stated at a Congressional hearing on June 26, 2007, that the "law has to have some objective meaning. It can't be just a question of how we all feel about it" and that laws should not change with the change in political composition of the Commission. He explained that he did "not think that there's anywhere where it could be more important for there to be predictability and clarity in rulemaking than when it comes to our capital markets, because so much is at stake that people have to make big bets on whether or not what they're doing is the right thing to do.... I think we do a great disservice when we are anything but clear and predictable, rule-based and law-based." I agree with Chairman Cox.

On the issue of predictability in the law, I note what happened to shareholders who were defrauded by Enron when they brought a lawsuit charging certain Enron executives and directors—along with the company's accountants, law firm and banks—with violation of federal securities laws. The alleged violations included massive insider trading while making false and misleading statements about Enron's financial performance. The shareholders reached a settlement with several financial institutions, but while claims were still pending against a

number of additional institutions, in March 2007, the Court of Appeals for the Fifth Circuit granted the banks complete immunity from liability. The court acknowledged that the banks' conduct was "hardly praiseworthy," but it ruled that because the banks themselves did not make any false statements about their conduct to the shareholders they could not be held liable, even if they knowingly participated in the scheme to defraud. In an extraordinary admission, the court acknowledged that the ruling runs afoul of "justice and fair play." The ruling also is at odds with the position of the SEC, with its wealth of specialized knowledge on the issues of contention in both the Enron case and *Stoneridge*, and with rulings of other courts.

The Solicitor General is entitled to aid the Court in its interpretation of the law, and I applaud his close attention to this critical case. I am concerned, however, that he has been unable to articulate a legal position—either for or against the plaintiffs—that is independent from the Administration's policy preferences. As you have often said, substantive changes to the law should be made through the legislative process, not through the courts.

Thank you for attention to this matter.

Sincerely,



Arlen Specter

Mr. President —

The SEC is right to have  
the Solicitor General  
argue to reverse the  
*Stoneridge* case where the  
court made new law  
reversing what Congress  
did in the statute.