Judge Samuel A. Alito, Jr.
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The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Specter:

I am writing in response to your letter of November 10, 2005, regarding cases on which I sat as a judge involving Vanguard and Smith-Barney, Inc. I appreciate the opportunity to address this issue. This matter is extremely important to me because throughout my career, I have been committed to carrying out my duties as a judge in accordance with both the letter and spirit of all applicable rules of ethics and canons of conduct.

I recently have had the opportunity to review the Senate Judiciary Committee questionnaire that I completed in 1990 when I was nominated to the U.S. Court of Appeals for the Third Circuit. The 1990 questionnaire requested that I assess my conflicts during my "initial service," on the court. In responding to that question, my intention was to state that I would never knowingly hear a case where a conflict of interest existed. I believe that my conduct has been consistent with the expectations I stated for how I would handle recusals during my initial service on the court of appeals. As my service continued, I realized that I had been unduly restrictive on my 1990 questionnaire because there was not a legal or ethical obligation under the applicable rules, statutes, and the Code of Conduct for U.S. Judges to recuse myself from every case involving the companies I listed. To the best of my knowledge, I have not ruled on a case for which I had a legal or ethical obligation to recuse myself during my 15 years on the federal bench.

With respect to *Monga v. Ottenberg,* 43 Fed. Appx. 523 (3d Cir. 2002)(table decision), I sat on the original panel that heard the appeal. Due to an oversight, it did not occur to me that Vanguard's status in the matter might call for my recusal. After the court's unanimous decision was issued affirming the district court ruling, the appellant raised the issue of my interest in Vanguard. My principal financial interest in Vanguard is in the mutual funds I own, which were not at issue in this lawsuit. After the issue was raised, I reviewed the applicable ethical rules and guidelines. According to the Code of Conduct and parallel language in 28 U.S.C. section 455, I did not have a financial interest in the outcome of the case. This law states that a financial interest exists in this type of case only "if the outcome of the proceeding could substantially affect the value of the interest." (Canon 3C.(3)(c)(iii) and 28 U.S.C. 455(d)(4)(iii)). Nevertheless, my personal practice is to recuse myself when "any possible question might arise." Thus, I voluntarily recused myself once my participation was called into question. Moreover, notwithstanding the fact that my vote on the unanimous panel did not affect the outcome, I took

the extra and unnecessary step of requesting that a new panel of judges be appointed to rehear the case. The new panel of judges reached the same unanimous conclusion as the prior panel.

In 1997, I was on the panel that decided *Johnston v. Smith Barney, Inc. et al*, 129 F.3d 1255 (3d Cir. 1997). Smith Barney is my brokerage firm and I hold no interest in the firm itself. The applicable ethical rules and guidelines indicate that a broker/customer relationship does not require recusal unless the "outcome of the proceeding could substantially affect the value of the interest." (Canon 3C.(3)(c)(iii) and parallel language in 28 U.S.C. 455(d)(4)(iii)). That was not the case in *Johnston v. Smith Barney.*

While I do not believe that I am required to recuse myself from cases involving Smith Barney or Vanguard, with the exception of these two cases, it has been my practice on the Court of Appeals not to hear such cases in order to avoid any questions under the ethical rules and guidelines. The 1990 questionnaire sought my recusal plans for my "initial service" as a judge. I respectfully submit that it was not inconsistent with my questionnaire response for me to participate in two isolated cases seven and thirteen years later, respectively. Finally, apart from the questionnaire, to my knowledge I have not ruled in a case for which I had a legal or ethical obligation to recuse myself during my 15 years on the federal bench.

I am proud of the record I have established during my 15 years on the Federal bench, not only in terms of my jurisprudence but my integrity. I appreciate your giving me this opportunity to address these concerns, and look forward to the opportunity to address them directly before the public at my hearings if any member of the Committee still has questions at that time.

Sincerely,

Samuel A. Alito, Jr.

cc: The Honorable Patrick J. Leahy