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A question of patience

By Joanna Chung in New York

Few things are ordinary about Bernard Madoff's alleged \$50bn fraud - including the way it is being investigated.

The Securities and Exchange Commission, the main US financial markets watchdog, is conducting the civil investigation into the alleged \$50bn "Ponzi" scheme, which came to light after Mr Madoff's sons turned him in last month.

Yet the same office within the same agency is simultaneously being excoriated for failing to detect Mr Madoff's fraud in the first place, in spite of numerous red flags.

Back in 2005 and 2007, the New York office of the SEC completed two inquiries into Bernard L Madoff Investment Securities. Twice it decided not to pursue legal action.

Today, more than two-dozen officials from that same office are trying to piece together how Mr Madoff masterminded a fraud that may have spanned decades.

The SEC has company, however. As is customary, prosecutors from the US Attorney's office for the southern district of New York are conducting a parallel but separate investigation with the help of the Federal Bureau of Investigation.

They charged Mr Madoff with criminal securities fraud last month. This week, they asked a federal judge to jail him for allegedly violating a court order and transferring more than \$1m of valuables from his Manhattan apartment - where he is under house arrest.

This case is also unfolding in an unexpected way. Ordinarily,

white-collar prosecutors spend months building evidence before arresting their targets. Here, they acted within hours of learning of Mr Madoff's alleged confession. Since then, both prosecutors and the SEC have been tight-lipped, and they have not yet sought an indictment. Many questions remain unanswered, at least in public, including whether others were involved.

"The secrecy may be explained in part by the need to find where the money is buried and lock it down before a shark-like feeding frenzy erupts among the major creditors," said John Coffee, Columbia University law professor.

The SEC and US Attorney's investigations normally overlap. The SEC furnishes its information to the federal prosecutors, though the reverse may not occur because of grand jury secrecy rules.

The SEC has an easier task: it can win a civil case with the preponderance of evidence, while criminal cases must be proven beyond reasonable doubt.

Criminal penalties are far more severe and tend, therefore, to be that much higher. The securities fraud charge against Mr Madoff carries a maximum penalty of 20 years in prison. The SEC, can ask a judge to freeze assets - and impose monetary penalties.

While the SEC and prosecutors focus on Mr Madoff, a court-appointed trustee and the Securities Investor Protection Corporation, which protects investors in failed brokerages, is conducting a separate probe to locate and recover assets and funds for swindled investors.

The trustee, Irving Picard, who

is overseeing the bankruptcy and liquidation of Mr Madoff's company, has asked a court for unusually broad authority to subpoena witnesses and documents.

New York authorities, including Andrew Cuomo, the state attorney general, and Robert Morgenthau, the Manhattan district attorney, could also have jurisdiction in this case. They declined to comment. People close to the situation said they may be reluctant to get involved when so many others already are. Mr Cuomo's office has no record of ever having received a complaint about Mr Madoff.

At the same time, the SEC itself is being investigated for its regulatory failings - by its own inspector-general, David Kotz. He is examining e-mails of former and current SEC employees and contractors in Washington and the New York and Boston regional offices.

Congress is also examining what went wrong in the Madoff case and asking whether new regulators are needed.

"For those of us who don't trust the SEC any more, what additional authority should be given to other regulators to provide a better safeguard against the sort of agency failure that occurred with the SEC?" said Representative Carolyn Maloney at a hearing this week.

Even this may not be enough to uncover what really went wrong, some government critics say.

"With something of this magnitude you need an investigation by someone who is not tied to the SEC at all," said Ellen Zimiles, a former federal prosecutor.