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LOOKING FOR THE PERFECT ENFORCEMENT REMEDY

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Commissioner

The views expressed herein are those of Commissioner Treadway and do not necessarily represent those of the Commission, other Commissioners, or the staff.

LOOKING FOR THE PERFECT ENFORCEMENT REMEDY

Introduction

In overseeing an organized enforcement program, Commissioners frequently discuss not only the substantive law, but also remedies and sanctions. We frequently ask:

- Is an injunction effective; if so, when and why?
- Is an injunction merely a slap on the wrist; if so, when and why?
- Should the Commission have cease and desist authority?
- Should the Commission have the authority to levy fines?
- Should the Commission have other expanded enforcement remedies?
- Is there a downside to expanded Commission enforcement powers?

Our dialogue about remedies and sanctions has not remained within the four walls of 450 Fifth Street, as demonstrated by a recent (January 1, 1985) Wall Street Journal article. Its title was "Some on SEC Seeking Harsher Penalties For Flagrant Violators of Securities Laws" -- a catchy title. The article led off:

> Sentiment is growing at the Securities and Exchange Commission for barring flagrant violators of securities laws from serving as officers or directors of publicly held companies.
>
> Several SEC commissioners and senior officials say they are fed up with corporate officials who repeatedly violate securities laws. And in speeches, some of them have begun venting their exasperation, contending that the SEC should do more than simply ask the courts to enjoin corporate miscreants from breaking the law again.
>
> Nobody is more vociferous than James Treadway, the first commissioner to advocate invoking the seldom-used enforcement option of asking the courts to bar blatant repeat offenders. Mr. Treadway also favors asking Congress to give the SEC explicit statutory authority to issue debarment orders.

The Wall Street Journal article correctly emphasized that my remarks were aimed at egregious violations and repeat violators. The article also confirmed my expectation that even broaching the subject of bars would bring forth a storm of controversy. The article went on to note the views of the other members of the Commission about bars, which, when analyzed, do not seem to differ substantially from mine.

Daniel Goelzer, our General Counsel, has suggested that Section 15(c)(4) of the Exchange Act, as amended by the Insider Trading Sanctions Act, may empower the Commission to issue administrative orders barring individuals who "cause" issuers to violate reporting, proxy, and recordkeeping requirements from holding corporate office. Section 15(c)(4) has always authorized the Commission to require compliance "upon such terms and conditions as the Commission may specify," and Dan reasons that a wide range of remedies are potentially available, including orders barring individuals from association with a public company. Dan points out that, as long ago as 1976 in a Section 15(c)(4) proceeding, the Commission accepted two individuals' undertakings to refrain from serving as an officer and director of any public company for three years. 1/

All this talk has put the issue of bars squarely in public view. Today, I would like to step back from the emotion of the current debate and share some thoughts about bars with you, and perhaps offer some insight into the Commission's thought processes. I start with four observations:

First Observation: Calm down, this is not so drastic or draconian as you may first think, and my one of my goals today is to convince you of that.

Second Observation: The Commission is completely serious about bars.

Third Observation: My first and second observations are not contradictory, and I'm also going to convince you about that.

Fourth Observation: Bars are not nearly so novel as some argue.

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1. In Re Government Employees Insurance Company, Exchange Act Rel. No. 12930 (October 27, 1976). See also In Re Hycel, Inc., Exchange Act Rel. No. 14981 (July 20, 1978).

What Is The Commission After?

If those four observations are valid, then what is this all about? Perhaps we should start by asking: "What is the Commission after?" The bottom-line answer is the "perfect enforcement remedy." The Commission seeks that remedy which effectively deals with the violation, deters future violations, does not overreach or unnecessarily interfere with personal freedoms, internal corporate affairs, or matters traditionally left to state law, is fully consistent with the general intent of the federal securities laws but goes not one step further, and protects public investors and the integrity of the marketplace without being punitive.

If that correctly defines the perfect enforcement remedy, much delicate balancing is clearly involved. So that you can decide whether the Commission is a judicious balancer, let's look at an actual case which resulted in a bar -- the recent Florafax 2/ case, also mentioned in the Wall Street Journal. The Commission alleged that Florafax, aided and abetted by its CEO, Joseph Hale, 3/ published financial statements which materially overstated revenue and income and materially understated required reserves over a two year period. Florafax was alleged to have:

- improperly recognized revenue by recording as sales unauthorized, "for approval," and consignment shipments;
- conducted a multi-year campaign of shipping unordered products to boost sales, with returns associated with such "sales" ranging from 28% to 69% of purported sales;
- sold its products through the use of telephone sales scripts, written by Hale, which emphasized an unconditional right to return products for any reason and the absence of any obligation to pay for products shipped -- in reality, consignment shipments improperly recorded as sales when shipped.

Florafax consented to an injunction against further violations of various provisions of the Exchange Act. Florafax also was required:

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2. SEC v. Florafax International, Inc., Joseph H. Hale and Kirk Nellis, Civil Action No. 84-C-937-B (N.D. Okl.), Lit. Rel. No. 10617, Acctg. and Aud. Enf. Rel. No. 44, CCH Fed. Sec. L. Rep. ¶73,444 (November 27, 1984).

3. Hale was Chairman, Chief Executive Officer, and owns 28% of Florafax's stock. Hale was Florafax's President and Chief Operating Officer from 1981 to 1983.

- to correct and amend its quarterly and annual reports and restate financial statements;

- to engage, in addition to its own accountants, a special auditor to review and report on the restatements, with the special auditor to file with the restatements a special report setting forth the results of its review;

- to recalculate Hale's compensation, which was based on a percentage of pretax profits during the years in question;

- to maintain, for at least three years, an audit committee comprised of three independent directors.

Hale also consented to a permanent injunction against further violations of various provisions of the Exchange Act. Hale also was ordered to resign as Chairman and Chief Executive Officer and to refrain from serving directly or through any nominee as an officer or Chairman of the Board of Florafax for three years, although he remains a director of Florafax.

What prompted the Commission to seek this relief, particularly Hale's bar? Given Hale's controlling interest in Florafax, the extent of his involvement in the activities, and the multi-year nature of the violations, the Commission was convinced that nothing short of a bar would ensure Florafax's future compliance with the securities laws. That conclusion was buttressed by Hale's involvement in a 1983 litigated Commission case, SEC v. World-Wide Coin Investment, Ltd., et al. 4/ This was the first case litigated under the Foreign Corrupt Practices Act. Hale was found to have committeed numerous violations of the FCPA, by

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4. CCH Fed. Sec. L. Rep. [1983 Tr. B.] ¶99,214 (N.D. Ga. May 23, 1983). In 1979, Hale became the controlling shareholder, Chairman of the Board, Chief Executive Officer and President of WorldWide. According to the District Court opinion, Hale aided and abetted numerous violations of the accounting provisions the Foreign Corrupt Practices Act, literally by dismembering World-Wide's system of internal auditing controls. The complete breakdown of internal accounting controls at WorldWide rendered the financial statements included in its quarterly and annual reports totally lacking in reliability. The court found that Hale also violated the antifraud provisions of the Exchange Act by acquiring World-Wide stock in exchange for worthless property, which he overvalued, and by falsely entering in the corporate minute book that the directors approved the exchange. In addition, an offering

(footnote continued)

systematically and intentionally dismembering World-Wide's internal auditing controls. Along the way, he also violated the Williams Act, the proxy rules, periodic reporting requirements, and the antifraud provisions. Hale was a repeat violator, and the deterrent impact of the first injunction was clearly negligible.

Consider another recent case involving a bar, SEC v. San Saba Nu-Tech, Inc., et al. 5/ The Commission alleged that Tripple and Thouvenelle, the principal officers and directors of San Saba Nu-Tech and San Saba Energy, first caused San Saba Energy to issue a series of grossly misleading letters which effectively conditioned the market for a planned offering. 6/ This public offering was abandoned because of Energy's accounting problems. 7/

But Tripple and Thouvenelle were men of persistence -- if you can't do it directly, there's always the indirect route. So they incorporated Nu-Tech, which had no operations, and move forward toward a public offering. Nu-Tech disclosed that it intended to manufacture and market a device no home should lack -- a water conservation toilet known as the "Meditator Toilet" -- that conjures up colorful images -- and to manufacture certain electronic control devices.

The Commission alleged that Nu-Tech's registration statement:

- failed to disclose that purported assignments of rights to manufacture the electronic devices were invalid because the purported assignors had no rights to assign;

(footnote continued)

circular sent to shareholders in connection with a tender offer by Hale to purchase additional common stock contained numerous misrepresentations, as did the proxy statements. During Hale's management of World-Wide Coin, he caused that company to purchase a sizeable interest in Florafax, without disclosing that he was attempting to obtain control of Florafax.

5. Civil Action No. 84-2921 (D.D.C.), Lit. Rel. No. 10531 (September 19, 1984).

6. The letters stated that, as a result of a San Saba Energy acquisition of an Amex-listed company and the planned merger with an OTC company, San Saba Energy stock and the stock of a subsidiary which would be issued at 25 cents and 10 cents per share, respectively, would trade after one month at $2.00 and 50 cents per share, and that the planned underwriting was oversubscribed.

7. Energy's inability to obtain an unqualified auditors' opinion.

- falsely stated that the Meditator Toilet was patented;
- failed to disclose that a required consent of the inventor of the Meditator Toilet had not been given; and
- failed to disclose that, even if Nu-Tech's offering had occurred, the world sadly would still lack the Meditator Toilet, for all along, Tripple and Thouvenelle intended to cause Nu-Tech to lend the offering proceeds to Energy, and Energy was then to repay money it had borrowed from Tripple and Thouvenelle and pay an unsatisfied judgment against Energy, Tripple and Thouvenelle -- a blatant, preconceived diversion of assets.

The action was settled by consent. In addition to the standard "don't do it again" injunctions, 8/ Tripple and Thouvenelle were barred from selling, offering to sell or participating in the offer or sale of any security by or for any issuer for several years. They also were barred for five years from holding the positions or performing the duties of officers or directors of any company with publicly traded securities. Tripple had previously been enjoined from violating the anti-fraud provisions of the Securities Act and Exchange Act in 1971.

The pattern is the same as in Florafax -- repetitive, serious violations. Note, however, that the bar in Florafax related only to positions at Florafax, whereas the bars of Tripple and Thouvenelle run to any public company.

Did the Commission in those two cases properly balance all the factors contained in my definition of the perfect enforcement remedy? I think so. Did the Commission go too far in seeking bars? I think not.

A Broader Look At Ancillary Relief

Bars, of course, are only one aspect of the broader issue of ancillary relief, and litigated cases dealing with ancillary relief are relatively few. None has considered the subject of bars -- at least by that name -- and the Supreme Court has considered the general issue of ancillary relief only once. Deckert v. Independence Shares Corp. 9/ was a 1940 private action under

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8. Each defendant was permanently enjoined from violating the registration and anti-fraud provisions of the Securities Act. Tripple and Thouvenelle also were enjoined from violating the anti-fraud provisions of the Exchange Act.

9. 311 U.S. 282 (1940).

Section 12(2) of the 1933 Act, seeking rescission, restitution, a receiver to wind up the affairs of the issuer, and an injunction restraining a trustee from disposing of assets. In dictum the Court stated:

> The power to enforce implies the power to make effective the right of recovery afforded by the Act. And the power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case. 10/

I find little clear guidance there about ancillary relief generally, and even less about bars.

We can, of course, find some litigated District Court and Court of Appeals cases on ancillary relief which provide guidance. One is a 1977 case, SEC v. Beisinger Industries Corp. 11/ Beisinger essentially is a looting case -- valuable corporate assets were secretly sold to insiders for nominal consideration. 12/ Virtually no disclosure of this activity was made in various Commission filings and public reports, and the transactions resulted in false financial statements. The District Court appointed a special agent and instructed him to retain an independent accounting firm to perform a special audit for three years, to supervise and file reports with the Commission, and to supervise and secure the dissemination of information to the public. The First Circuit affirmed.

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10. Id. at 288.

11. 552 F.2d 15 (1st Cir. 1977), aff'g 421 F. Supp. 691 (D. Mass. 1976).

12. Beisinger Industries transferred over half its corporate assets (over $1 million in cash and receivables) to a wholly-owned subsidiary. That subsidiary then acquired an on-going operating corporation. Later that year, Beisinger sold all of the outstanding stock of the subsidiary for $9,500 to a corporation which was wholly-owned by Beisinger management. The first disclosure of the transfer of assets or the sale of stock came in Beisinger's 1973 10-K, filed 8 months after its due date. Beisinger's auditors revealed that Beisinger had precluded an examination of advances to the subsidiary, so they could not express an opinion on Beisinger's financial statements. Subsequent secret transfers of corporate assets were discovered, and the accountants issued a similar disclaimer in connection with the 1975 Form 10-K.

Beisinger involves a special agent, not a bar. But how clear or meaningful is that distinction? This special agent assumed control of significant duties normally performed by officers and directors -- including the control of the audit and accounting function, the preparation and filing of periodic reports, and the dissemination of critically important information to the public. There is a logical connection between those duties and the disclosure process, but this relief also effectively barred management from performing functions which state law authorized them -- and only them -- to perform. And those functions were, at this time in the corporation's life, of a most critical and sensitive nature. Why is this relief any different from a de facto partial bar?

Consider another litigated ancillary relief case, SEC v. Koenig, 13/ a 1972 case relied upon by Beisinger. In Koenig, the Commission brought two Rule 10b-5 enforcement actions against a publicly-held corporation and its president within a short period of time. 14/ The first resulted in the standard injunction. The second time the Commission also sought the appointment of a "limited receiver," with the power to investigate and report upon the state of corporate affairs and to convene a stockholders' meeting.

Emphasizing that the defendants had engaged in a "complex set of secret securities transactions" which left the Court in the postion of being unable to determine the nature and extent of the injury to stockholders, had committed numerous disclosure-related violations, and had frustrated "all attempts of dissident shareholders to change... management," the Court ruled:

> In view of these past activities, the Court concludes that it cannot rely on the defendants to implement the directions of the Court... A receiver therefore will be appointed and will be directed to (1) investigate the recapitalization of the European subsidiaries of ECO; (2) make full, complete and accurate public disclosure of all material events and facts concerning the defendants, their officers, agent, servants, employees, directors, subsidiaries and affiliates; (3) make timely and accurate filing of reports with the Commission in conformity with Section 13(a) of the Securities Exchange Act and the Rules promulgated

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13. 469 F.2d 198 (2d Cir. 1972).

14. Both actions generally arose from allegedly misleading or inaccurate press releases and failures to disclose the true state of corporate affairs and transactions.

> thereunder and to make those amended filings necessary to correct those reports presently filed; (4) issue a report to ECO stockholders for the years 1970 and 1971; (5) hold a 1972 annual ECO stockholders' meeting and (6) make ECO's books and records and stockholder list available to any ECO stockholder who is legally entitled to access to these documents.

I pose the same question. How does this relief differ from a de facto partial bar of officers and directors? Didn't the Court bar management from performing functions and exercising powers contemplated by state law as effectively as if the Court's decree were labelled a partial bar?

Pursuing this thesis -- that bars by another name have been around for quite a while -- let's go back even earlier to a 1960 Ninth Circuit decision. In Los Angeles Trust Deed & Mortgage Exchange v. SEC, 15/ the Commission sought a receiver to take over the assets of a company that had committed extensive violations of the registration and antifraud provisions of the Securities Act and the antifraud provisions of the Exchange Act. The Commission ultimately prevailed, with the Court holding, among other things:

> Nor are we convinced that because the SEC has asked for authority from the Congress to broaden its statutory powers, and that Congress has not seen it proper to do so, means that the broad equitable powers of the federal courts cannot encompass "necessary ancillary" relief, such as the appointment of a receiver.

If a 1960 case fails to persuade you that de facto bars are not novel, let's go back to the Book of Genesis, at least insofar as the Commission is concerned. If you will read together the Commission's brief in the Los Angeles Trust case and the Commission's 1935 Annual Report, you will find an unreported, but litigated, 1935 Nevada District Court case, SEC v. Colonial Trading Co., which resulted in the appointment of a receiver to remedy violations of the 1933 Act. 16/

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15. 285 F.2d 162 (9th Cir. 1960).

16. D. Nev. 1935. The Commission's 1935 Annual Report discussed Colonial Trading as follows: "On April 11, 1935, the Commission filed in the United States District Court for the District of Nevada a suit against Colonial Trading Co. and 36 Affiliated persons, alleging fraudulent activities in violation of the Securities Act. A preliminary injunction [which included the appointment of a receiver] was obtained on April 19, 1935 against such defendants as had been served with process."
(footnote continued)

I would readily concede that this historical walk through some litigated ancillary relief cases proves that bars of corporate officers and directors all not novel only if you accept my basic thesis -- that many forms of ancillary relief amount to de facto bars by another name. But since a receiver -- even a limited receiver -- effectively deprives management of power and authority it otherwise has, it certainly seems to operate as effectively as a bar.

Moving from history, let's consider two recent cases, A.M. International 17/ and U.S. Surgical, 18/ focusing principally on the relief rather than the alleged violations. In neither case is the relief denominated a bar, but is the practical effect any different, at least from a partial bar?

In 1982 the Commission sued A.M. International, alleging numerous violations of the federal securities laws, principally involving massive, multi-year accounting violations accomplished

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(footnote continued)

The brief in Los Angeles Trust referred to several unreported cases, including Colonial Trading, stating: "Accordingly, receivers have been appointed in those actions governed by... the Securities Act and... the Securities Exchange Act where courts have found that the exercise of their equitable powers in the interests of investors appropriately carried out the intent of the federal securities laws...."

17. SEC v. A.M. International, Inc., Civil Action No. 83-1256 (D.D.C.), Lit. Rel. No. 9980, CCH Fed. Sec. L. Rep. [1982-1983 Tr. B.] ¶99,188 (May 2, 1983). The Commission alleged that AM grossly overstated its results of operations, assets, and shareholders' equity, understated liabilities, and misstated statements of changes in financial position. The Commission also alleged that various notes to AM's financial statements were false and misleading, including those describing accounting policies, interim results of operations, unusual income, bank loans and long-term debt, and the financial condition of AM's finance subsidiary.

18. SEC v. United States Surgical Corp., et al., Civil Action No. 84-0589 (D.D.C.), Lit. Rel. No. 10293, Acctg. and Aud. Enf. Rel. No. 22, CCH Fed. Sec. L. Rep. ¶73,422 (February 27, 1984).

by widespread misdeeds. 19/ AM consented to a permanent injunction, which included broad ancillary relief designed to place greater control over accounting and financial reporting matters with a significantly strengthened and more independent Audit Committee and with the independent auditors. The decree required AM to:

- maintain an Audit Committee of non-management Directors for a period of three years;
- appoint, after confirmation of its plan of reorganization two qualified, independent persons to serve as additional Directors and on the Audit Committee; and
- to retain its independent auditors for a three-year period to report on AM's accounting systems and procedures and to assess the adequacy of its system of internal accounting controls, in addition to any review which is part of the annual audit, with such special review being sufficient in scope, when coupled with the annual audit, to provide reasonable assurances that all material weaknesses have been discovered.

Among other areas, the independent accountants were directed to review AM's accounting system and procedures with respect to revenue recognition; intercompany transactions; accounting for and pricing of inventories; and the establishment of and periodic adjustment to asset valuation allowances. The independent accountants were to provide a written report of the review, and AM was required to take "any and all necessary and appropriate steps to correct or eliminate all material weaknesses noted."

Accounting and financial reporting irregularities of a pervasive nature extending over a number of years are likewise alleged in the Commission's case against United States Surgical

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19. The complaint alleged that losses related to inventory were improperly deferred and inventory was otherwise overstated; books were kept open after cut-off dates to increase sales and earnings; sales were recorded although products were not shipped; sales were inflated by deliberate double-billing; operating leases were recorded as sales; allowances for losses were arbitrarily reduced without any basis; sales were recorded although the products were only shipped to branch offices and a public warehouse, not to customers; accounting policies were changed that increased earnings without any disclosure; known errors that resulted in increased earnings were ignored; intercompany accounts were out of balance and the differences were arbitrarily reclassified as inventories; known inaccuracies in books and records were not investigated or resolved; costs of sales were manipulated; fixed assets were not depreciated; expense accounts were understated; and accounts payable were not recorded.

Corporation. 20/ Without admitting or denying the allegations, Surgical consented to an injunction against further violations of various provisions of the securities laws. The decree also embodied broad ancillary relief designed to strengthen the accounting and auditing functions, the Audit Committee, and the independent auditors. Surgical was ordered, among other things, to:

- appoint two new unaffiliated directors, acceptable to the Commission, for a period of at least 5 years, to serve on the Audit Committee;
- maintain and strengthen the position of chief internal auditor;
- review certain past and present accounting practices, retaining independent auditors to aid in the review and take whatever action was necessary, including restatement, amendment or adjustment of its financial statements;
- retain independent auditors to review and report to the Audit Committee on Surgical's current accounting policies, practices, procedures, and controls, their propriety and effectiveness, and the conduct (scope, timing, and effectiveness) of the audit function;

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20. The Commission alleged that, beginning at least in 1979 and continuing through 1983, the defendants materially overstated Surgical's earnings and financial condition as follows: (a) in 1979, Surgical reported pre-tax earnings of $7.9 million, when Surgical earned less than $6.3 million; (b) in 1980, Surgical reported pre-tax earnings of $12.1 million, when Surgical earned less than $8 million; and (c) in 1981, Surgical reported pre-tax earnings of $12.9 million, when Surgical earned approximately $200,000. The Commission alleged that Surgical issued falsified purchase orders to vendors, who in turn submitted untrue invoices so that Surgical's reported cost of parts was decreased and its reported cost of materials was improperly over-capitalized by over $4 million; shipped significant quantities of unordered products to customers and recorded them as sales; improperly treated shipments on consignment to dealers, salesmen, and certain foreign entities as sales, resulting in a cumulative overstatement of income of over $2 million; improperly failed to write-off assets which could not be located or had been scrapped and capitalized certain operating costs as overhead, increasing earnings by millions of dollars; improperly capitalized approximately $4 million dollars of legal costs, purportedly for the defense of certain patents, when those costs did not relate to the defense of patents and should have been charged to operations as incurred; and beginning in 1981, improperly capitalized the costs of 10,000 parts each time it purchased a new or modified mold or die, with such improperly capitalized costs alone amounting to approximately $5.7 million in 1981.

- have the Audit Committee review Surgical's financial statements, filings with the Commission, written reports of earnings or financial condition, and accounting practices, procedures, and controls; and

- have the Audit Committee engage a separate accounting firm to advise it for at least three years to assist it in fulfilling its independent responsibilities.

The term "bar" or "partial bar" nowhere appears, but what is the AM and Surgical relief? It involves new board members, new, independent audit committee members, restructured internal accounting procedures, the involvement of a second independent accounting firm, and a significant dilution of the authority of incumbent management. Does such relief not effectively bar elected officers and directors from managing the business affairs of these issuers?

That's enough about partial bars going under another name. In addition, outright bars -- denominated as such -- were obtained by the Commission at least as early as 1976 in settled cases. For example, in SEC v. Giant Stores Corp. 21/ the court barred four individuals from serving as officers or directors of any public company, or in a like capacity, or in any position with any responsibility for financial statements of a public company.

Our General Counsel has prepared an analysis of the 20 settled cases since 1975 in which the Commission has obtained bars of officers and directors. For those of you who obtain copies of my remarks, that listing will be attached as an appendix. 22/ As I indicated earlier, I am aware of no litigated case involving a bar.

The Dark Side Of The Force

From a Commissioner's law enforcement perspective, there is much about ancillary relief -- including bars -- that is attractive. Such remedies provide a feeling of a lessened likelihood of repeat violations; they may avoid the necessity for seeking contempt citations -- not a particularly easy or certain task; and they may help the Commission maximize the use of its resources -- no insignificant factor in a time of budgetary constraint.

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21. Civil Action No. 76-1641 (D.D.C.), Lit. Rel. No. 7546 (September 2, 1976). The case involved allegations of falsified corporate expense accounts, manipulation, and self-dealing.

22. Appendix A.

But while the Commission speaks positively of deterring violations and effectuating the purposes of the securities laws, critics react differently. Like Obiwan Kenobe in the Star Wars movies, they see a dark side to all of this. They fear that the Commission may go over to the Dark Side of the Force and become a regulatory Darth Vader -- undoubtedly fully cloaked in black and breathing heavily through a breath mask.

These critics ask a number of questions. Is the Commission using ancillary relief to impose its judgments about the integrity and qualifications of management? Is the Commission using ancillary relief to intrude into corporate governance, traditionally a state law matter? Is the Commission effectively disenfranchising shareholders when it selects or bars directors? Is the Commission involved in the negative licensing of directors and officers? What are the outer limits of ancillary relief and bars? Is all of this really a disguised preemption of state law? Do certain types of violations of the securities laws -- looting or accounting cases, for example -- justify bars more readily than others? If so, why?

And all of that takes us to perhaps the ultimate question: Is the Commission fashioning a federal law of corporations?

Those questions are not without substance. Even if I were to begin to try to answer each one separately, all of us would miss the afternoon session. But my one line answer is that seeking ancillary relief -- even bars in some instances -- and being concerned about such issues are not mutually exclusive. It is a question of balance, and a proper balance can be achieved. I also am convinced that experienced Commission-watchers, like those of you in this audience, will not hesitate to speak out if the proper balance is not maintained.

Conclusion

I began today by noting my title: "Looking For The Perfect Enforcement Remedy." 23/ I gave you my definition of that remedy --

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23. I previously referred to 20 cases since 1975, all settled by consent, that have involved some form of bar of officers and directors. The Commission has also obtained receivers of various types with varying powers, special trustees and fiscal agents, the disgorgement of illegal trading profits and tainted income, the appointment of new, independent directors and various committees and other internal restructurings, the rescission of certain transactions, special counsels to conduct investigations and file reports, freezes of assets, restrictions on voting, acquiring, or transferring shares, internal compliance procedures, and so on.

one that effectively deals with the violation, deters future violations, does not overreach or unnecessarily interfere with personal freedoms, internal corporate affairs, or matters of state law, is fully consistent with the intent of the federal securities laws but goes not one step further, and protects public investors and the integrity of the marketplace without being punitive. I have also suggested that many litigated ancillary relief cases effectively are partial bar cases, without using bar terminology.

My goal was to convince you that the current discussion about bars is not so drastic a development as some have suggested, that the Commission is approaching the issue with perspective and balance, and that bars certainly are not novel. I see by all the smiles and friendly faces that I have been completely successful.

But my goal also was to emphasize, if need be even alert you to, this development and the Commission's seriousness about bars, including partial bars that may not necessarily bear such a label. There is much momentum at work. With that happy ending, I thank you for your attention.

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APPENDIX A

DIGEST OF CASES SINCE 1975 IN WHICH THE COMMISSION HAS OBTAINED
A BAR FROM SERVICE AS AN OFFICER OR DIRECTOR OF A PUBLIC COMPANY

Case; Individual(s)	Allegations in Complaint/Judgment Securities Laws and Rules Cited	Terms of Bar: Offices	Companies	Years	Terms of Modification
1. SEC v. American Commonwealth Financial Corp. Lit. Rel. 7920 N.D. Tex. (1977) Roger LeBlanc	Self-dealing: use of corporate assets to secure personal real estate purchases. Failure to file Form 13D. Misstatements and omissions in Forms 13D and 14A filed. Exch. Act §§ 10(b),13(a),13(d),14(a); Rules 10b-5,13a-1,13a-11,13d-1,13d-2, 12b-20,14a-9	All except Director	Subject company only	Indef.	None
2. SEC v. Bio-Medical Sciences, Inc. Lit. Rel. 6700 S.D.N.Y. (1975) Berel Weinstein	Use of false and altered documents to induce commitments from other companies. Failure to disclose manufacturing capacity in marketing agreement. Secur. Act § 17(a) Exch. Act § 10(b); Rule 10b-5	Officer/ Director	Subject company only	Indef.	Court approval required
Lit. Rel. 6729 Zsigmond L. Sagi		Director	Subject company only	1	None
3. SEC v. Brad Ragan, Inc. Lit. Rel. 7681 W.D.N.C. (1976) Robert H. Buchanan	Bribes to and fraudulent billing of customers, excessive mark-ups by broker-dealer. Self-dealing: purchase of corp. assets at discount. Improper disclosure: revenue recognition and common control improprieties in amend and periodic reports, proxy and registration statements. Secur. Act § 17(a) Secur. Exch. Act §§ 10(b), 13(a), 14(a); Rules 10b-5, 12b-20, 13a-1, 13a-13, 12a-9	Officer/ Director	Any public company	3	None

Case; Individual(s)	Allegations in Complaint/Judgment Securities Laws and Rules Cited	Terms of Bar: Offices	Companies	Years	Terms of Modification
4. SEC v. Bundy S.D. Ill. (1981) William Bundy	Unregistered sale of single-premium annuity contracts. Misrepresentation of contracts as being fully-paid and fully-backed. Misleading financial statements; failure to keep proper books and records. Secur. Act § 5 Exch. Act §§ 17(a),10(b),13(b),15(d); Rules 10b-5,13b2-1,15d-1	All	Any public company	Indef.	After notif. of company and SEC.
5. SEC v. The Catawba Corp. D.D.C. (1981) John Buckley C. Dean Reasoner Benjamin Heath	Officers, directors and shareholders in privately-held corporation (Catawba) failed to disclose self-dealing transactions with related public corporations. Secur. Act § 17 Exch. Act §§ 10(b),13(a); Rules 10b-5, 12b-20,13a-1,13a-10	Officer/ Director	Subject company, subsids. and success.	Indef.	None
6. SEC v. Coombs Lit. Rels. 9906, 9850 D. Utah (1983) Ramon Onofrio	Misuse of intrastate offering exemption. False and misleading proxy statements and shareholder letters. Secur. Act §§ 5,17(a) Exch. Act § 10(b); Rule 10b-5	Officer/ Director	Any public company	5	None
7. SEC v. Cylinder Technology Ltd. Lit. Rel. 9926 D.D.C. (1983) Dale Finfrock Michael Lameyer	Unauthorized use of proposed tax opinion in sale of limited partnership interests in patented metal alloy. Secur. Act § 17(a)	Officer/ Director/ General Partner	Subject pshp.; succ. to patent; underwriter	5	None

Case; Individual(s)	Allegations in Complaint/Judgment Securities Laws and Rules Cited	Terms of Bar: Offices	Companies	Years	Terms of Modification
8. SEC v. Eastern Freight Ways, Inc. Lit. Rel. 7318 D.D.C. (1976) Henry Epstein Myron Shevell	Pruchase of substantial interest in co-defendant Assoc. Transport, Inc. through nominee account, without disclosure and with corp. funds. False filings, books and records. Secur. Act § 17(a) Exch. Act §§ 10(b),13(a),13(d),14(a); Rules 10b-5,13a-1,13a-11,13a-13,13d-1,13d-2, 14a-3,14a-9	Director/ Trustee	Subject companies or their employee pension plans	5	Court approval required
9. SEC v. El Dorado International, Inc. Lit. Rel. 9314 D.D.C. (1981) (1) Roger Newstrum (2) Deil Gustafson	Sale-of-control stock-for-stock merger; conversion of corporate funds. Violation of Nevada gaming laws in the merger. Secur. Act § 17(a) Exch. Act §§ 10(b),13(a),13(b)(2)(A),14(f); Rules 10b-5,13a-1,13a-11,13a-13,12b-20, 14f-1	Officer/ Director/ similar capacity/ control-ling share-holder	Subject company, plus any traded on exchange or OTC	(1) - 2 (2) - 4	SEC prior approval required
10. SEC v. Farrow D.D.C. (1978) Eugene Farrow Sidney Kessler Kenneth Klein	Misleading financials of § 12(b) company: - use of intercompany account to minimize expenses; - false sales of land and subsidiaries to related parties; accrual of sales but not of defaults. Secur. Act § 17(a) Exch. Act §§ 10(b), 13(a); Rules 10b-5, 12b-20,13a-1,13a-10	All	Any public company	Indef.	SEC prior approval required
11. SEC v. FISCO, Inc. Lit. Rel. 8073 D.D.C. (1977) William Rush Robert Reilly Leonard Connolly	Understating of subsidiary's loss reserves, deliberate use of certain methods to conceal. Resulting materially overstated income for 1972 and first through third quarters of 1973. Secur. Act § 17(a) Exch. Act §§ 10(b),13(a); Rules 10b-5, 12b-20,13a-1,13a-11,13a-13	Officer/ Director/ position involving policy decisions or fin. stmts.	Any public company except the subject company.	Indef	Court approval required

Case; Individual(s)	Allegations in Complaint/Judgment Securities Laws and Rules Cited	Terms of Ban: Offices	Companies	Years	Terms of Modification
12. SEC v. Florafax International, Inc. Lit. Rel. 10617 N.D. Okl. (1984) Joseph H. Hale	Improper revenue recognition practices: booking sales revenue based on contigent shipments. Nondisclosure and misleading disclosure on Forms 10-K and 10-Q; inacurrate books and records Exch. Act §§ 13(a), 13(b)(2); Rules 12b-20, 13a-1, 13a-13, 13b2-1, 13b2-2	Officer/ Chmn. of Board	Subject company only	3	None
13. SEC v. Giant Stores Corp. Lit. Rel. 7546 D.D.C. (1976) Theodor Kaufman	Falsification of expense accounts and receivables to overstate income. Market manipulation to raise price at the time of public offerings. Self-dealing by corporate officials. Secur. Act § 17(a) Exch. Act §§ 9(a)(1),9(a)(2),10(b); Rules 10b-5,10b-6	Officer/ Director/ "like capacity"	Any public company	Indef.	SEC prior approval required
Benjamin Lieberman		or any responsi-bility for fin. stmts.	Any public company	Indef.	SEC prior approval required
Authur Altman */		Same as Lieberman	Any public company	3	SEC prior approval but can keep present position if current litigation disclosed
Morton Levin		Officer/ Director	Any public company	2	SEC prior approval required

*/ An order permitting Altman to associate with publicly-held corporations was granted Dec. 13, 1983 by the United States District Court for the District of Columbia.

Case; Individual(s)	Allegations in Complaint/Judgment Securities Laws and Rules Cited	Terms of Bar: Offices	Companies	Years	Terms of Modification
14. SEC v. Gulf Resources, Inc. Lit. Rels. 10291, 10139 N.D. Tex. (1984) Jerry D. Eustler	Fraudulent sale of unregistered limited partnership interests and ohter participations in synthetic fuels operation; misrepresentation of company's assets revenues, and production capabilities. Misappropriation of sale proceeds. Secur. Act §§ 5(a), 5(c), 17(a) Exch. Act § 10(b); Rule 10b-5	Officer/ Director/ "control person"	Any public company	Indef.	SEC prior approval required
15. SEC v. National Pacific Corp. Lit. Rels. 7682, 7581 D.D.C. (1976) John Boden	Self-dealing and conversion of corporate assets. False and misleading financial statements filed with state insurance agencies. False and misleading Form 13D's filed in connection with purchase of other corporations. Secur. Act § 17(a) Exch. Act §§ 10(b),13(e); Rules 10b-5,12b-20,13d-1	Director/ CEO/CFO/ position with filing responsibility, unless supervised.	Companies reporting under Exch. Act §§ 12, 13, incl. those exempt under §12(g)(2).	5	None

Case; Individual(s)	Allegations in Complaint/Judgment Securities Laws and Rules Cited	Offices	Companies	Years	Terms of Modification
16. SEC v. The Starr Broadcasting Group, Inc. Lit. Rel. 8667 D.D.C. (1979) William F. Buckley, Jr.	Self-dealing: sale to corporation of assets of directors' partnership in order for directors to avoid personal bankruptcy. Nondisclosure of these transactions in Commission filings. Failure of independent directors to insure the accuracy of the company's disclosures. Failure of company's bank and loan officer to insure the accuracy of the company's disclosures. Secur. Act § 17(a) Exch. Act §§ 7,10(b),13(a),13(d),14(a), 16(a); Rules 10b-5,12b-20,13a-1,13a-11, 13d-1,13d-2,13d-3,14a-3,14a-9,16a-1; Reg. G of the Board of Governors of the Federal Reserve System	Officer/ Director	Any public company	5	Court and SEC approval required
Michael F. Starr		Officer/ Director/ or any resp. for SEC filing	Any public company	5	Court and SEC approval required
Gordon M. Ryan		Officer/ Director/ Gen. or in-house Counsel	Any public company	5	Court and SEC approval required
Glenn E. Burrus		Officer/ Director/ or any resp. for SEC filing	Any public company	3	Court and SEC approval required
17. SEC v. Stirling Homex Corp. D.D.C. (1975) David Stirling, Jr. William Stirling	Housing built under HUD program; sales were accrued before HUD approval. Ultimate lack of HUD approval resulted in reorganization in 1972. False/misleading statements in Forms 10-K, 10-Q and S-1, and interim/annual reports to shareholders. Insider trading; self-dealing; loans to union officials to purchase stock. Secur. Act § 17(a) Exch. Act §§ 10(b),13(a); Rules 10b-5, 13a-1, 13a-13	Officer/ Director/ "like capacity"	Any public company	Indef.	SEC prior approval required
Harold Yanowitch		Any with duty to file SEC reports	Any public company	Indef.	SEC prior approval required
Edwin Schulz		CFO	Any public company	2	SEC prior approval required

Case; Individual(s)	Allegations in Complaint/Judgment Securities Laws and Rules Cited	Terms of Bar: Offices	Companies	Years	Terms of Modification
18. SEC v. Tiffany Industries, Inc. Lit. Rels. 9656, 9444 E.D. Mo. (1981) Farrell Kahn	Overstatement of sales and earnings by falsification of books. Private placement while such false and misleading statements were on the books; similarly, Forms 10-K, 10-Q, and proxy statements also false and misleading. Secur. Act § 17(a) Exch. Act §§ 10(b),13(a),13(b),14(a); Rules 10b-5,12b-20,13a-1,13a-3,14a-3,14a-9	Officer/ Director/ "like capacity"	Any public company	Indef.	Disclose injunction to company; 30-day prior notice to SEC..
19. SEC v. Tiger Oil International, Inc. Lit. Rel. 8597 D.D.C. (1978) Edward Mike Davis	Fraud in contribution of assets by Davis to Tiger Oil; misleading shareholder communication and press releases; inducing shareholders to give up contractual rights. Trading while in possession of material nonpublic information. Secur. Act § 17(a) Exch. Act § 10(b); Rule 10b-5	Officer/ Director/ same duties or functions	-publicly held -traded on exchange -$1 mill. in assets and 750 shareholders; -except subject co.	5	None
20. SEC v. Wencke Lit. Rel. No. 7874 S.D. Cal. (1977) Walter Wencke	Scheme to take over and loot company; placing of company in receivership with defendant as receiver to conceal and consummate the fraud. Exch. Act §§ 10(b), 13(a), 14(a)	Control positions	Any public company	Indef.	Court approval required

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