NEWS

SECURITIES AND EXCHANGE COMMISSION
Washington, D. C. 20549
(202) 272-2650

FOR IMMEDIATE RELEASE

PERSPECTIVES OF A NEW COMMISSIONER

Remarks of
Commissioner Barbara S. Thomas
U.S. Securities and Exchange Commission

N.Y.U. Club
New York, N.Y.
May 14, 1981

PERSPECTIVES OF A NEW COMMISSIONER

Good afternoon. I am especially pleased to be here at the NYU Club today because, as most of you probably know, I graduated from this law school in 1969, after spending three stimulating years here. The farther I get from those days, the more I appreciate this fine institution and how strong and solid a foundation it provided me.

I am now embarked on a new and exciting adventure, serving as a member of the Securities and Exchange Commission. Washington is a whole new world for me, and one in which I have had to feel my way quite a bit. There is one point, though, that I am very glad to have learned early in the game: that government officials, right up to the top, are only human beings. No matter how much power they wield, no matter how lofty the job, they bring to it all of their own experiences and prejudices, all of their personal hopes and fears.

Saying this may seem like saying the obvious, but it is a point of which it is easy to lose track. Many of the processes of government, many of its trappings, tend to obscure the ultimate humanity of its officers. As lawyers, we are especially susceptible to losing track of this point, because our job <u>is</u> to focus on the processes of government and to try to interpret them in terms of logic and precedent. But, I believe that if one wants to understand government and to be a truly effective participant, there is no other single point more important to keep in mind than the fact that government is no more than a collection of human beings.

With that in mind, I would like to share with you today some of

the perspectives that I bring to government. As many of you know, before joining the Commission, I worked for over a decade as a securities lawyer, facing the many challenges that confront those who seek the capital to build and expand American business. There is no doubt that this experience has shaped my perspective on a number of issues with which the Commission deals regularly. Sometimes -- too often, in fact -- I found in private practice more than challenges. I found obstacles: governmentally-imposed requirements and prohibitions that were, I felt, quite unjustifiable, and that only added to the cost of a given transaction without adding a commensurate degree of investor protection. I also found many areas where the boundaries of the law were unnecessarily clouded, so that legitimate commercial transactions -- which could have generated the jobs and production facilities America so badly needs -- were abandoned because business people were afraid to proceed in the face of legal uncertainty. Accordingly, I come to the SEC determined to press the agency to continue and expand its current program to rationalize and simplify and, where appropriate, to eliminate the welter of rules that I feel are weighting down American business today.

That, however, is not the whole of the matter. I have told several newspaper interviewers in the past six months that I was bringing to the Commission a fresh perspective and an open mind. That is true, despite my experiences in private practice. I have been acutely aware right from the start of my tenure on the Commission that, as a private practitioner, I had seen only a part of the picture of the SEC's activities; that I viewed those activities mostly from the perspective of the entities the Commission regulates; and that

my clients were among the more responsible of those regulated by the Commission. There is no doubt that this determination to keep an open mind has served me well. To a greater or lesser extent, my experiences since joining the Commission have served to shape each of the perspectives I intend to discuss today.

There are two major substantive areas on which I would like to offer my views today: the question of deregulation and regulatory reform generally, and the Commission's enforcement program. Each of those areas currently seems to be generating a deal of interest.

Deregulation and Regulatory Reform

My first area of discussion today -- deregulation and regulatory reform -- is of course a topic that has ramifications far beyond the SEC. Indeed, it is one of the major topics of discussion in Washington these days. The SEC has a great deal to contribute to these discussions. I dare say that, historically, we have been one of the more successful regulatory agencies. We are also one of the first to move aggressively to alleviate the unnecessary burdens our regulations have sometimes imposed.

It seems to me that any discussion about deregulation has to start with some consideration of the goals of regulation. The goal of the SEC is and always has been to promote strong, honest and efficient securities markets. The importance of these goals is in no way diminished by the current move for greater freedom of business from government regulation and greater reliance on the free market forces. Indeed, their

importance may well be enhanced by this movement. Unlike regulation in many other fields, the Commission's goals represent not an interference with the forces of the free market, but an effort to keep the markets functioning close to their theoretical ideal.

Even more importantly, perhaps, the Commission's goals grew out of the very painful experience of an earlier generation. Our parents learned the hard way of the need for strong capital markets: by seeing their life savings disappear almost overnight, or by standing in the bread lines of the Depression. We would be very foolish to throw that experience away or downplay its validity.

To say that we ought not to disregard our parents' experience, though, is not to say that we cannot build on that experience, and synthesize it with our own. Indeed, we must. Our experience teaches us a much greater sensitivity to the proper use and limitations of regulation as a means of controlling business. In years past, we thought we could achieve a better society if only we could specify in enough detail the procedures that every business had to follow in a number of areas: what information they had to give their stockholders, how much they could charge their customers, what markets they could enter, and so on. But in the past few years, we've become acutely aware of the limitations of these regulatory techniques as a means of controlling business. We now understand that they have negative consequences subtle in their operation but devastating in their overall impact: they can stifle creativity and initiative, and erode the individual's personal sense of responsibility. We know now that society as a whole pays the price of the implementation of these regulations, and that the price may sometimes outweigh the benefits.

To me, a synthesis of our experience to date in connection with securities regulation means that the Commission's long-standing goals of maintaining honest, efficient, and smoothly-functioning capital markets must remain intact. Our methods, on the other hand, must come under close and constant scrutiny if we are to minimize the burdens they impose. We have learned that overregulation of the securities markets and of securities issuers can hurt capital formation just as surely as it would be hurt by no regulation at all.

The Commission, as you may know, has had for some time an active program to re-examine and revamp out-dated and overly burdensome regulations. In the past couple of years, we've broadened substantially the small issuer exemptions from '33 Act registration, simplifying their use and increasing the maximum dollar amount of new securities that can be sold without registration. For registered public companies, we're integrating the '33 Act and '34 Act disclosure requirements and introducing continuous registration. We've made it easier to resell privately-placed securities, and alleviated the plight of the inadvertant investment company.

I am personally committed to continuing this re-examination and to achieving more balanced and less burdensome securities regulation. The Commission's direction in recent years coincides very closely with what I, in my years as a private practitioner, felt it should be doing. I intend to do all in my power to see that this continues, despite the budget cuts and personnel problems to which the Commission is now subject.

There is, however, another side to the question of deregulation that bears some emphasis today. I am sure many of you are familiar with

a number of the initiatives recently taken in Congress or elsewhere under the rubric of "regulatory reform:" the Bumpers Amendment, which would alter the standard of review when agency regulations are challenged in court, so as to undercut the agency's ability to rely on its own substantive expertise in the area it regulates; the Regulatory Flexibility Act, already law, which requires all agency rulemaking which would have a significant economic impact on a substantial number of small entities to be accompanied by preliminary and final published statements of the impact of the rule on small business and the reasons the agency has rejected possible alternatives; the Paperwork Reduction Act, also now law, which requires an agency to obtain OMB approval of any forms the agency wishes the public to fill out, whether compliance is mandatory or voluntary; the one and two-house legislative veto of agency rulemaking, which would allow Congress to override new agency rules by the vote of one or both houses acting without Presidential concurrence; and the various proposals to require detailed cost-benefit analyses to be made before new rules can be issued.

I firmly believe that these proposals are counterproductive. Indeed, there is something quite ironic about them as an approach to deregulation. They are nothing short of an attempt to "regulate" the regulatory agencies into deregulation. They would specify in minute detail exactly what procedures each agency would have to follow in its rulemaking, what subject matter it would have to consider, and what statements it would have to include in its releases. They would impose on agency rulemaking a requirement for review by congressional staff or by officials in <u>other</u> agencies -- people who in all likelihood will not be as well-informed as the officials of the original agency.

I predict, if these measures are adopted, that we will find in the coming decade that they are no more useful as a means of controlling government than they have been as a means of controlling business. We will see government officials shuffling even more paper about than they have in the past, with less in the way of substance to show for it. We will find that we are attracting a lower calibre of intellect to public service; that government is unable to react quickly when it has to; and that, when all is said and done, we have accomplished very little to increase the average government agency's sensitivity to the costs of regulation, or to the burdens it puts on the business community.

Furthermore, this effort to "regulate the regulators" is characterized by some of the same excesses that have characterized government regulation of business. For example, critics of the current regulatory process frequently assert that someone in government ought to monitor all regulation imposed by all agencies, as a means of containing the total costs imposed on various businesses by a variety of agencies, each pursuing its own mandate. Some such coordination seems reasonable.

But, applying this same principle to the regulatory reform movement itself, is anyone bothering to look at the total cost imposed on government agencies by the various reform initiatives of recent years? Already we have the Freedom of Information Act, the Government in the Sunshine Act, the Right to Financial Privacy Act, the Equal Access to Justice Act, the Paperwork Reduction Act and the Regulatory Flexibility Act. Each of these statutes imposes new costs and administrative responsibilities on the agencies. The Regulatory Flexibility Act and the Right to Financial Privacy Act alone will cost the Commission $607,000 to administer next year. Moreover, these costs are duplicated throughout

the government, as each agency or department develops its own "reform" staff, and the Executive Branch puts in place a staff to review the efforts of the operating agencies.

These problems apparently will get worse before they get better. On April 30, the "Regulatory Reform Act of 1981" was introduced into the Senate. This bill would require all agency rulemaking to be accompanied by a statement describing the data, methodology, and other information upon which the agency is relying; a memorandum of law describing the agency's authority to issue the rule; and an explanation of how the agency's factual conclusions are substantially supported in the record.

If the rule is deemed to be a "major" rule, by reason of having a substantial adverse effect on the economy, the agency must also prepare a cost-benefit analysis, quantifying the data whenever possible, as well as a discussion of alternatives. To avoid these requirements, the agency must state why it thinks the rule is not a "major" one. The bill also embodies the Bumpers Amendment altering the standard for judicial review of agency rulemaking.

None of this is to say that the regulatory process does not need some external discipline or some checks and balances. Experience teaches us that it most assuredly does. But they ought to be of a more substantive nature, a re-examination of each agency's fundamental mission. The SEC, for example, has attempted in recent years to integrate into its regulatory activities a broad notion of capital formation. Specific congressional guidance with respect to the extent to which we ought to consider this notion, and how we should strike the balance when capital formation seems to conflict with investor protection, would

be very helpful.

To the extent that detailed procedural changes are adopted, they ought to be applied differently to different agencies, based upon an analysis of each agency's mission. A lot of the procedures now sought to be imposed were created by people who had in mind health and safety regulations. These strictures simply do not make sense applied to an agency such as the SEC, whose basic job is to keep the markets honest and efficient.

In short, I think that, as a society, we make a mistake if we think that our real need for regulatory reform will yield to a quick fix or a broad brush approach. Developing a synthesis between our understanding of the problems that led us to impose regulation in a given area in the first place, and our understanding of the limits of regulation, is a very important and sophisticated exercise. We ought to devote to it the degree of care and thought that it deserves.

The Commission's Enforcment Program

This brings me to my second topic, the Commission's enforcement program. This is one area where my perspective has changed quite a bit since my days in private practice, to where I now believe that the SEC's Enforcement Division plays a critical role in the proper functioning of the American securities markets.

I did not always have such feelings. I must say, quite frankly, that as a private practitioner, I found it hard to see much justification for some parts of the Commission's wide-ranging enforcement program. From where I sat, in a large law firm with established corporate clients, my concept of securities law violators consisted mainly of corporate

officials who would call up and ask, "Is it really compensation if I hitched a ride on the company plane? Do I really have to disclose it?" Sure, there was an occasional Michele Sindona, but, overall, the days of the bucket shops were long-since over, and the boiler-room brokerage firms were on the run. I believed that clients came to lawyers to be counselled on how to stay on the right side of the law or, at worst, to come as close to the line as possible, but not to cross over it. I think that's a fairly common perspective nowadays.

Well, my friends, that's not the way it is. There is an on-going problem of what we call "garden-variety" securities fraud. The people who perpetrate these frauds never think about going up to the line but not crossing it. They never even see it -- and do not want to be seen themselves. For example, we find unregistered securities offerings which, by the time we arrive on the scene, have absolutely nothing to show for tens of millions of dollars of investors' money. We have a persistent problem of insider trading, some of it by people in extremely sensitive positions of trust. And we are finding that, as in the past, the very active new issues market is beginning to attract some sharks.

Please don't misunderstand me. The American securities markets enjoy an unparalleled reputation for honesty and fairness, and I don't intend to cast any aspersions on that reputation. It is fully deserved. When I refer to an on-going problem of securities fraud, I am referring to a small minority who are unrepresentative of the industry as a whole. But, because of the way they have chosen to pursue life, their influence is out of all proportion to their numbers.

It is this circumstance, the constant presence of the unprincipled

few and the disproportionate threat that they pose, which gives rise to the need for a strong SEC Enforcement Division, one that has the resources and the morale to do a thorough job; one that has the encouragement to stay at what must sometimes seem to be a never-ending task.

What I am left feeling, then, is a tension between, on the one hand, the need for aggressive and creative law enforcement, and, on the other hand, the dangers that always accompany a law enforcement organization that enjoys a great deal of deference. There is nothing about this tension that is especially unique to the SEC. Nor does there seem to be any magic answer to be obtained by restructuring the Enforcement Division or any of the other things that have lately been suggested.

The answer is simply continued vigilance by those in charge. The members of the Commission review the Division's activities at every major step in every case, to insure that they are doing what we want them to do. If we continue to exercise our authority in a responsible fashion, we can help to insure that the strong arm of the Enforcement Division is being utilized effectively. Such oversight is a job I willingly accept. In fact, given how much the the Enforcement Division contributes to the work of the agency, it is one of the things that makes it most worthwhile to be a Commissioner.

Conclusion

One last observation about the SEC as a whole: As many of you know and as I was warned when I went down there, the SEC has periodically been characterized as a staff-bound agency. The potential for that is certainly there. The people on the staff are extremely bright, competent and

dedicated, and it is their excellence and expertise that have provided the SEC with the superb reputation it now enjoys. In addition, many on the staff have been at the Commission a long time, while Commissioners come and go. However, as a result of my short experience thus far, I still believe that the philosophy and dedication of the Commissioners can make a significant difference, and that each of us can affect policy if we are inclined to make the effort involved in making our views known to the staff, supporting them in crucial situations, and, occasionally, shouldering the unpopularity that may accompany a vote which is out of the mainstream. This, however, is the main responsibility of an effective Commissioner, and I personally am looking forward to the opportunity to fulfill it.