

ADMINISTRATIVE PROCEEDING
FILE NO. 3-11390

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
December 20, 2005

In the Matter of :
: ORDER
: PAUL A. FLYNN :
: :
: :
: :

Paragraph III.C of the Order Instituting Proceedings (OIP) seeks disgorgement of ill-gotten gains as one of the possible remedies in the public interest. At the December 2, 2005, prehearing conference, the Division of Enforcement (Division) explained that the ill-gotten gains it seeks to disgorge in this proceeding involve “all or substantially all” of the salary and bonuses earned by Paul A. Flynn (Flynn) during the period of the alleged misconduct. The possible disgorgement of a respondent’s salary presents unsettled or at least evolving issues. See Rita J. McConville, Securities Exchange Act of 1934 Release No. 51950, 2005 SEC Lexis 1538 at *57 n.64 (June 30, 2005).

In contrast to the OIP in many other administrative proceedings, Paragraph III.C of the OIP in this matter does not specifically identify prejudgment interest as a possible remedy. Accordingly, I asked the Division to clarify its position on the issue of prejudgment interest (Scheduling Order dated Dec. 2, 2005).

The Division has now filed a letter, arguing that an award of prejudgment interest on any sums ordered to be disgorged is mandatory under Rule 600(a) of the Rules of Practice of the Securities and Exchange Commission (Commission). In the Division’s judgment, this is true whether or not an OIP specifically identifies prejudgment interest as a possible remedy. Flynn has replied to the Division’s letter and the Division has submitted a sur-reply.

The Division’s position on this issue is inconsistent with the position it recently announced in a contemporaneous case being prosecuted by the same regional office.¹

¹ The attention of the parties is invited to the September 30, 2005, OIP in Administrative Proceeding No. 3-12064, Gregory M. Dearlove, CPA. Paragraph III.C of the Dearlove OIP also seeks disgorgement of ill-gotten gains, without specifically identifying prejudgment interest as a possible remedy.

I will not issue an advisory opinion on possible sanctions. At this stage of the proceeding, liability has not yet been adjudicated. If liability is not established, or if disgorgement is not ordered, then the issue of prejudgment interest will be moot.

If the Division wishes to eliminate the uncertainty surrounding this issue, it may file a motion asking the Commission to amend the OIP. See Rule 200(d)(1) of the Rules of Practice.² If the Division believes that amendment of the OIP is unnecessary, it may litigate the case under the OIP as written.



James T. Kelly
Administrative Law Judge

At a prehearing conference in Dearlove, the Division stated that it seeks to disgorge from Dearlove the salary and benefits he earned for conducting an audit that allegedly failed to comply with the appropriate professional standards. The Division represented that it is not seeking prejudgment interest in connection with the requested disgorgement of salary and benefits in that proceeding (Dearlove Prehearing Conference of Oct. 28, 2005, at 33-34).

² Such a motion should be addressed to the Commission, rather than the presiding Administrative Law Judge. See Rules 200(d)(1)-(2) of the Commission's Rules of Practice.