SEEKING NEW SANCTIONS: COMMENTS ON DEVELOPMENTS IN THE COMMISSION'S ENFORCEMENT PROGRAM

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10th ANNUAL NORTHWEST SECURITIES INSTITUTE
VANCOUVER, BRITISH COLUMBIA

March 9, 1990

U.S. Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 205491

I. INTRODUCTION

It is a great pleasure to be here in Vancouver. Jack Bookey was one of the first regional administrators to welcome me to the Commission, and despite the great geographical distance separating the Seattle Regional Office from Commission headquarters in Washington, D.C., Jack, his staff and I have developed a strong relationship. I am glad to be able to be at this conference, and to meet so many members of the bar from the great Northwest.

II. NEW TRENDS

During the past sixteen months I have observed a perceptible shift in several areas of the Commission's enforcement program. The most notable change, if not the most easily discernible, has been in our approach to sanctions in enforcement cases. Comparing sanctions from case to case is notoriously difficult, because each case presents unique facts and staff resources vary from region to region and year to year.

While hard data making meaningful comparisons is difficult to come by, I believe that the Commission has been insisting on tougher terms for settlements -- particularly with regard to disgorgement of ill-gotten gains by securities law violators. As a part of this movement towards stronger sanctions, the Commission has also been pressing ahead with its request to Congress for passage of a Securities Enforcement Remedies Bill, which would grant the Commission new powers, including enhanced authority to seek disgorgement and penalties.

A second change has been in our emphasis on fighting penny stock fraud. In October 1988, the Commission announced a major initiative against penny stock fraud. Since that time we've seen many more cases involving penny stock fraud and market manipulation. Many of the penny stock fraudsters investigated and prosecuted by the Commission are recidivist violators. Their wrongdoing is often shockingly cynical and egregious. They truly do prey upon senior citizens, widows and orphans. In my view, the commissioners' growing exposure to this sector of the market has had a direct impact on the Commission's thinking with respect to sanctions.

I would like to take the opportunity of being with you today to look back, and assess what we have achieved in the past year and four months in the fight against penny stock abuses, and to comment on the Commission's need for additional authority to seek or impose sanctions.

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On February 1, 1990, Chairman Breeden delivered testimony on behalf of the Commission, to the Securities Subcommittee of the Senate Banking Committee concerning the need to grant the Commission authority to seek or impose new enforcement remedies, including penalties in both court and administrative proceedings. Calls for and against the delegation of additional enforcement powers to the Commission have been made from time to time over the years. The debate over the Commission's remedies, and its enforcement philosophy, entered a new phase, after

1984, when the Commission sought, and was granted the authority to seek court imposed civil fines for insider trading.

Today, the debate about Commission enforcement powers has become part of a larger, and ultimately more important debate about the ability of the federal government to adequately punish and deter corporate and white collar offenses against a host of victims: banks, savings and loans, and the environment, as well as securities firms and investors.

For example, at the same time the Congress is considering granting new authority to the Commission, the U.S Sentencing Commission is considering proposals to require considerably stiffer fines and penalties for corporate wrongdoers in criminal cases. Also, legislative proposals have been introduced in Congress to limit the use of bankruptcy, with its generous state law homestead exemptions, by fraudsters attempting to shelter millions of dollars of ill-gotten gains from court orders requiring restitution, disgorgement or fines. A further example of a broad move towards tougher sanctions are the penalties included in the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA"), also known as the S&L bailout bill.

The debate about new sanctions is taking place in the context of two major scandals. The first of these, the S&L industry conflagration -- is the greatest financial fraud and regulatory failure since the modern federal government, and the alphabet soup agencies such as the SEC, emerged out of the New Deal. There are estimates that the total taxpayer cost to close insolvent thrifts, payoff depositors, and run the bureaucracy necessary to dispose of thrift assets will top $200 billion over the next ten years.

The second of these great scandals, is the still unfolding expose of Wall Street excesses in the takeover boom of the 1980s. While the cases against Dennis Levine, Ivan Boeskey, Michael Milken and Drexel are often referred to as an insider trading scandal, the ramifications of these cases may extend beyond insider trading. Newspaper reports, have made direct charges of a causal link between the collapse of various savings and loans, and abuses in the sale of various types of bonds, including junk bonds to those savings and loans by investment banking firms.

The enormity of the S&L implosion, and the public fascination with the Wall Street investigations, has kept attention focused on the issue of corporate and white collar wrongdoing. The bankruptcy of Drexel Burnham Lambert, and Exxon's recent indictment have contributed to the attention focussed on corporate and white collar crimes. As a result, we may be at, or approaching, one of those points in history where a new consensus is reached, fundamental attitudes towards a public policy issue shift, and government seeks to respond with new initiatives that reflect, and reenforce the new consensus.

The broad public interest in the confidence-jarring white collar scandals of the past four years sets the stage for new attitudes. However, the forces behind the Commission's insistence on stiffer sanctions when settling cases, the decisions made about the scope of the proposed Securities Enforcement Remedies Act, and the decisions to be made about the guidelines that will be established to implement that Act, if passed, are made on the basis of more narrow, more focussed considerations, such as our experiences with the Commission's penny stock task force. It is to a review of those task force experiences that I would now like to turn.

III. THE PENNY STOCK TASK FORCE -- AN INTERIM ASSESSMENT

Many penny stocks represent legitimate investment opportunities, and the market for these stocks is an honest one. However, experience has shown that many other penny stocks are used in fraudulent schemes which involve "shell" companies with no operating history, few employees, few assets, no legitimate prospects for business success, and markets that are manipulated to the benefit of the promoters of the companies and/or the market professionals involved.

Money is the prevalent inducement to engage in fraudulent activity, and the profits to broker-dealers and their salespersons in penny stocks can be enormous. For example, over approximately a one-month period, two penny stock brokers monitored by one of the Commission's offices traded shares of two companies with a combined net worth of about $1 million. During this month, the brokers' profits in transactions involving these companies amounted to $3.5 million, more than three times the net worth of the two companies. Salespersons in some firms can reportedly make $5,000 per month after six months and $10,000 to $20,000 per month after one year's sales experience. Top salespersons at some penny stock firms have earned from $20,000 to $50,000 per month.

Shortly after its creation in October 1988 the Penny Stock Task Force identified four critical goals for the Commission in its efforts to combat penny stock fraud: (1) increased co-ordination and information-sharing with other federal, state and local regulators and prosecutors; (2) stepped-up enforcement activities, including criminal referrals when appropriate; (3) targeted regulatory solutions; and (4) investor education. The Commission has made significant progress in each of these areas.

A. Increased Coordination and Information-Sharing

Efforts of the Task Force to increase coordination and information-sharing have included the holding of ten regional meetings around the country with federal and state regulators and prosecutors, including U.S. Attorneys' Offices and the Federal Bureau of Investigation, and with the National Association of Securities Dealers, Inc.. Commission staff also meet regularly with enforcement groups from the North American Securities Administrators Association. These meetings have also lead to the creation of local task forces which meet regularly to coordinate activities in their regions, and to a variety of intensive training sessions conducted by SEC staff and others.

The direct and indirect benefits from these meetings and training sessions are extremely important. The opportunity for face-to-face contact with our federal, self-regulatory, state, and foreign counterparts has proven invaluable in forging a stronger network of communication and cooperation among regulators and prosecutors.

From October 1988 to October 1989 -- the first year of the Task Force's existence, civil access grants increased 65% from 193 to 330. Criminal access grants increased 66%, from 136 to 226. While the dramatic increase is not fully attributable to the efforts of the Penny Stock Task Force, it is indicative of the success of the Commission's efforts in this area. We expect cooperative efforts with other organizations in joint investigations, examinations and information sharing will continue to expand.

B. Stepped-up Enforcement Activities

A second critical goal of the Task Force is to increase, as appropriate, its enforcement actions in the penny stock fraud area and the number of criminal referrals. From fiscal year 1988 to fiscal year 1989 enforcement actions increased by 58%—from 43 to 68.

Too often, the individuals responsible for organizing, financing and executing stock manipulations in penny stocks are not deterred by the civil remedies that are currently available to the Commission. These civil remedies are viewed as part of the cost of doing business. Therefore, to deter penny stock fraud more effectively, the Commission has been actively seeking to enlist the help of federal, state, and local criminal prosecutors.

The Commission's broker-dealer examination program has placed a great emphasis on examining broker-dealer firms engaged in a penny stock business. In the last 19 months, the Commission's regional offices have completed 197 examinations of penny stock broker-dealers. These examinations have uncovered serious violations involving excessive mark-ups, market manipulation, high-pressure boiler-room sales practice abuses, and misrepresentations concerning the business activities and financial condition of corporate issuers. Enforcement referrals have been made in 48% of the completed examinations, and an additional 10% have been referred to the NASD for enforcement consideration. The Commission will coordinate its broker-dealer examination program with the NASD and continue its emphasis on examining penny stock firms in 1990, with particular focus on compliance by firms with new Rule 15c2-6.

State securities regulators and the NASD also are playing a vital role by bringing their own actions in the penny stock area. Notable in this regard are proceedings against numerous penny stock promoters, including state actions against Power Securities and NASD proceedings stemming from the Haas Securities failure.

C. Targeted Regulatory Solutions

A third goal of the Task Force involves the review of the Commission's regulatory structure and the consideration of regulations targeting penny stock fraud. A broad range of ideas has been discussed by the Task Force as well as with representatives from various state and federal agencies. As a result of these discussions, the Commission has adopted Rule 15c2-6 and is considering the adoption or proposal of other rules.

Rule 15(c)(2)(6) represents a major initiative to combat fraudulent sales tactics by penny stock broker-dealers. It was adopted by the Commission in August 1989 and went into effect on January 1, 1990 -- too recently to judge its effects. In summary, the rule requires that broker-dealers obtain information concerning the customer's financial situation and investment needs, make a written determination that penny stocks are a suitable investment for the customer, provide this determination to the customer, and obtain a manually signed and dated copy of the suitability determination from the customer before the customer makes his initial purchases.

Boiler-room salespersons realize the importance of making a sale while on the telephone and use high pressure tactics to close the sale. The written agreement requirement is intended to remove this pressure for an immediate decision, and provide records for regulators to determine whether brokers are making appropriate disclosures and suitability determinations. Because of the exclusions and exemptions included in the rule, it should have minimal impact on legitimate broker-dealers.

D. **Investor Education**

The last of the Task Force's critical goals is increasing investor awareness of how to recognize and avoid fraudulent penny stock schemes. The Task Force has adopted two principal means of achieving this goal—preparing and distributing to the public educational bulletins that warn of concerns about penny stocks and encouraging media coverage of the efforts and focus of the Task Force.

The task force has published three information bulletins to alert investors to the signs and dangers of penny stock fraud and to advise investors of the new protections under Rule 15(c)(2)(6). These bulletins have been widely distributed through publication in the media, and directly. For example, our Miami Branch Office arranged for over 1.8 million copies of the first bulletin to be distributed by banks, savings and loan associations, and major utility companies in Florida.

The Penny Stock Task Force has also made particular efforts to help assure that the radio, television, and print media are aware of the mission and actions of the Task Force, including the penny stock actions of state, federal, foreign, and self-regulatory authorities.

E. **Indicators of Success**

Due to the nature of the conduct that is the subject of any antifraud enforcement program, it is normally impossible to obtain empirical data from which definite conclusions of the success of the program may be drawn. There is, however, one source of data that provides significant indications that the Penny Stock Task Force is reducing boiler room activity and penny stock fraud.

Broker-dealers periodically file with their self regulatory organizations reports containing financial and operational data. Data from these reports for the seven quarters ending September 30, 1989 show a significant decline in the number of all broker-dealers regularly engaged in the penny stock market. From a peak of 352 at the end of June 1988, the latest number shows a decline of 14% to 303 such broker-dealers.

Report data also disclose that the compensation of registered representatives employed by penny stock broker-dealers declined 29% from a peak of $91.3 million in the third quarter of 1988 to $64.7 million in the third quarter of 1989. Similarly, the sales force of penny stock broker-dealers declined 26% from its peak of 5,230 in the fourth quarter of 1988 to 3,848 in the third quarter of 1989.

As a regulator, when I hear those figures, I must ask whether the decline in penny stock activity represents a decline in fraudulent activity, only, or whether it also represents a decline in legitimate OTC trading. The data do not answer this question. However, strong anecdotal evidence suggests that the decrease in penny stock activity is the result of shuttering abusive boiler rooms, and not a result in decreased legitimate trading.

In fact, the presence of an active criminal element in the pink sheet market logically be expected to inhibit legitimate OTC activity. Cleaning up that market should have solid long term benefits for legitimate firms even if there are short term disruptions from adverse publicity concerning OTC market risks.

IV. ACHIEVING REALISTIC DETERRENCE

The assessment of the Penny Stock Task Force after 16 months in action must be highly positive. But in considering the experience of the Task Force as a guide for other enforcement initiatives it is useful to analyze different causes for the reduction in penny stock activity.

The significant successes of the Penny Stock Task Force reflect, in part, the particular nature of the illegal conduct being policed. For example, economically rational, fully informed investors will not buy stocks being sold on the basis of the outlandish hype used by boiler room salespeople. By educating consumers, or requiring a 15(c)(2)(6) cooling off period, the Commission can exert a direct effect on the size of the market and the profits available to fraudsters. The fact that stocks must be sold through regulated entities, broker-dealers, which are required to keep certain books and records, and to permit SEC access to those records, also gives the Commission an advantage. Further, the Commission has fostered and received cooperation from other agencies and the SROs, especially the NASD, which have the jurisdiction and the resources to combat this kind of fraud.

By contrast, opportunities for educational and regulatory initiatives by the Commission or SROs against fraud are not available in most other program areas. There is no way to educate the public to avoid issuers who issue cleverly falsified financial statements, or traders who are buying and selling on the basis of inside information. In combatting financial fraud, insider trading, and most other frauds policed by the Commission, the ability to deter wrongdoing with the threat of appropriate sanctions is the Commission's most prominent enforcement tool.

Effective deterrence of economic crimes has at least three aspects. First, a wrongdoer must fear being caught. Second, a wrongdoer must believe that when he is caught there will be appropriately severe consequences. Third, the wrongdoer must believe that justice will be reasonably swift. A violator motivated by economic gain who is given four or five years to spend or secrete his gains before he faces a final order of disgorgement will not greatly fear such an order.

What are appropriate consequences? Economists say that the appropriate sanction is a function of the probability of being caught and convicted. In other words, the "expected value" of illegal conduct must be zero, or negative. For example, if there is only a 50 per cent probability of being apprehended, sanctions must be two times the amount of potential illegal profits to stop a rational criminal from stealing.

In reality it is not so simple. There are non-economic sanctions, such as professional bars. Also, different people have different aversion to risk, and make different assessments of the probability of being caught.

Over the past 16 months, my participation in Commission deliberations with respect to authorizing proposed enforcement actions and settlements in penny stock cases, as well as all the other cases in which the Commission has made fraud allegations, leads me to believe that the Commission, should, and indeed it has begun, to do more to increase the deterrent effects of its enforcement activities. However, this process is not without its complications. In theory, all three aspects of effective deterrence should be pursued. In practice, the goal of swift justice is often inconsistent with the goals of detecting wrongdoing and obtaining adequate sanctions.

What has the Commission been doing to increase deterrence? First, to increase the probabilities of catching wrongdoers the Commission has requested funds sufficient to add approximately 100 new staff positions for enforcement activities.

Second, as I mentioned at the beginning, I believe there is a discernible trend of seeking stiffer sanctions in settlements. Recently the Commission has been more consistent about seeking disgorgement. Ordering the disgorgement of illegal profits -- even if a malefactor lacks the funds to pay disgorgement -- is almost always proper as a matter of fairness and in order to promote confidence in the integrity of the law enforcement system.The Commission has also insisted on pre-judgment interest in a number of recent settlements. This was not formerly done, on a consistent basis, yet, it makes no sense to let a violator have the benefit of interest on his ill-gotten gains. I think it would be an extremely difficult challenge today for a proposed defendant or respondent to convince the Commission to accept a settlement without pre-judgement interest.

Another example is in our agreements with persons who claim economic inability to pay disgorgement to the victims of their frauds, prejudgment interest or penalties. The Commission is frequently confronted by violators who claim to have been economically destroyed when the scheme they were involved in collapsed. The staff has been advised that such claims should be thoroughly investigated, and settling defendants or respondents are almost without exception required to submit sworn financial statements and/or tax returns.

The staff has also been advised that all settlements which excuse payment of disgorgement amounts based on an inability to pay should now explicitly state that the settlement is voidable, and the defendant subject to perjury or other charges, if he has misrepresented his financial condition. In a number of cases the Commission has also pursued installment payment plans from defendants who are down, but not really out.

Further, the Commission has sought to extend the application of the equitable principles which govern disgorgement to permit recovery of ill-gotten gains in new areas, such as 13D violations. I also expect a new effort to seek disgorgement in market manipulation cases. Finally, although it is still too early to find a clear trend, I think the current Commission has a tendency to seek sanctions against more of the participants in illegal schemes, and to ask the staff to increase the periods of suspensions or bars in proposed settlements.

The insider trading area is the single area where the Commission has clearly and consistently established criteria for settlements that effectively wring out of wrongdoers all profit -- and then some -- from their illegal activity. With rare exceptions, the Commission has insisted that insider traders who wish to settle their cases before a complaint is filed must consent to an injunction, and pay full disgorgement plus a one-time penalty. This certainty increases deterrence. The consistency of the Commission's policy also reduces the time devoted to settlement negotiations.

With two minor exceptions, the Commission does not have the authority to seek fines for violations other than insider trading. Accordingly, sanctions with respect to many other aspects of the Commission's fraud prevention program, as well as non-fraudulent regulatory violations are not as potent in economic terms. Nor, because non-monetary sanctions are not as susceptible to a bottom line analysis comparing one settlement to another, are the sanctions perceived as being as consistently applied. The Commission's proposed Enforcement Remedies Bill addresses this lack of authority.

Some critics have suggested that increasing sanctions, with or without the Remedies Bill, will have an unintended, negative effect on the enforcement program. The irony is, they say, that seeking stiffer sanctions may be contrary to achieving a timely resolution of proposed enforcement actions. In cases dealing solely with economic wrongdoing, raising the cost of settlement may also reduce, from the defendant's perspective, the benefits of settling. If the cost of settling exceeds the cost of litigating plus the risk of losing the litigation, or will deprive a defendant of all his assets, more defendants may litigate. This can be a highly rational choice, because even if a defendant litigates and loses, he will be no worse off than if he settles.

The decision to litigate may be particularly rational if there is a possibility, that if a defendant delays long enough, staff turnover, or the aging of his case, will lead a different Commission to consider a more favorable settlement down the road.

People who warn of diverting resources from investigations to litigation point out that the Commission has very robust investigatory powers. We are able to delve into matters a private party could never examine prior to litigation. In addition, we receive complaints and tips that no private party does. Accordingly, exposure of wrongdoing, "getting the story out" to the investing public is more important in many cases than any sanction the Commission could achieve in litigation. Once a scam is exposed collateral actions brought by aggrieved shareholders or defrauded investors may be as effective as Commission action in obtaining relief, or limiting a wrongdoer's future access to the securities markets.

These same concerns about a potential rise in litigation were raised when the Commission sought and was granted authority to seek penalties for insider trading, and proved to be largely unfounded. Most insider trading cases do settle. Usually the Commission has an overwhelming case, and litigation would not only be fruitless, but irrational because of the expense. In many cases, the violators do not have the resources to litigate, and in other cases they settle because they do not have the assets to pay the disgorgement or penalties anyway, so little is given up by agreeing to these stiffer sanctions.

There is also the possibility stiffer sanctions, including potential penalties requested in the Remedies Bill, will lead some defendants to settle who would otherwise risk litigating.

Whether or not there is more litigation, or less as a result of the Commission seeking stiffer penalties, many cases do, and will, take two, three or four years to reach a trial on the merits on overcrowded civil dockets. Appeals can consume additional time. Even administrative proceedings conducted by the SEC's own administrative law judges can take years to reach a conclusion. Justice delayed is justice denied. To increase deterrence we must do what we can to see that proceedings are moved along expeditiously.

We should consider what additional steps can be taken to provide additional federal judges, or a system that requires judges to give some priority for enforcement cases brought by federal agencies. The public is not well served when law enforcement actions to protect the public interest are compromised because of the unavailability of a federal courtroom to try those actions.

We should also focus attention on our administrative process. Recently the Commission considered settlement of an administrative proceeding which had been authorized over one year ago, but not yet filed.

Respondents, appealing from the initial decision of an Administrative Law Judge who inquire when, after final briefs are filed, the Commission will schedule oral argument, are informed by the staff that no one knows. It could be two months, and it could be 12. These and other experiences convince me that the Commission should explore the advisability of policies or procedures which will establish an SEC "speedy trial act" geared to our own administrative process.

For example, unless a defendant waives filing, I would like to see standing instructions to the staff requiring all administrative actions to be filed within a set number of days of Commission authorization. This would force settlement negotiations to take place with a realistic deadline, as well as force the staff and Commission to make more explicit choices in deciding litigation priorities.

Similarly, I would like to see a normative standard established to require the Commission to hear oral argument within a fixed period after final appeal briefs are filed, and to issue an opinion within a fixed period of time thereafter. Rigid deadlines, though offering a surface appeal, may cause more harm than good. They could only apply if a quorum of commissioners was available, and there would have to be provisions for the chairman to certify that the exigencies of Commission business required a pre-determined extension of time. Such exceptions might render any rule a nullity -- or worse. But the point is that we should seek to establish a standard of promptness that creates a climate of regularity and fairness.

Litigated administrative proceedings often involve complex issues. Hearings may require months of testimony. We also need to consider what, if any, additional steps can be taken to assure that hearings are conducted in the most expeditious and efficient manner possible. Unless the efficiency of the administrative process is improved, new administrative remedies being sought from Congress may not provide the flexibility and effectiveness we hope they will provide.

V. ENFORCEMENT REMEDIES LEGISLATION

As I mentioned earlier, on February 1, Chairman Breeden presented testimony to the Senate Subcommittee on Securities urging passage of an amended Securities Enforcement Remedies Act. The Commission's original Enforcement Remedies Act proposals arose in large part from recommendations made by the Treadway Commission in 1987 and were submitted to Congress in September 1988. These original proposals sought amendments to permit assessment of new civil money penalties in court and administrative proceedings, to permit the Commission and the courts to bar persons from serving as an officer or director of a public company, and to permit administrative proceedings under Exchange Act Section 15(c)(4) for violations of the officer and director beneficial ownership reporting provisions of Section 16(a). The Commission explicitly declined to seek a new "cease and desist" authority.

The testimony presented February 1 suggested major revisions to the previously proposed legislation. First, in a reversal of the Commission's prior recommendation, the testimony called for express authorization for the Commission to issue cease and desist orders for violations of all, or virtually all provisions of the federal securities laws. Violations of a cease and desist order would be punishable by a court imposed civil penalty in addition to an injunction directing compliance with the order. Also, the Commission would be authorized to order disgorgement, in the original cease and desist proceeding and to assess penalties in cease and desist proceedings against regulated entities such as broker-dealers, investment advisers and investment companies.

The Commission also sought authority for temporary cease and desist authority for use in emergency situations. And, the Commission proposed that c&d proceedings could be brought against any person who is a "cause" of a violation.

Second, the Commission dropped its recommendation that we be allowed to impose director or officer bars administratively. The revised proposal does call for express authority for a federal court to impose a director or officer bar, but would limit that authority to cases involving scienter based fraud allegations. In light of these changes, the Commission's revised proposal did not call for any amendments to Section 15(c)(4).

Chairman Breeden and I voted in favor of all the recommendations to increase the Commission's authority. Commissioner Fleischman concurred with the recommendations expanding Commission authority only with respect to those provisions which would permit the Commission to enter disgorgement orders in our own administrative proceedings. He did not favor the cease and desist authority as proposed, including a broad "cause" standard triggering liability and authority for temporary, _ex parte_ orders.

I voted in favor of the testimony presented to the Congress because it is clear that, given the varied nature of cases brought by the Commission, we must have a wider range of remedies and greater flexibility in the enforcement program. Most important in my view are authority to order disgorgement in administrative proceedings, authority to seek or assess penalties, and expansion of the Commission's administrative jurisdiction to include Exchange Act Section 16(a) violations and '33 Act offering violations.

However, I certainly recognize that the Commission's new proposals are sure to spark comment and even controversy in some quarters. In addition to Commissioner Fleischman's dissent, Gary Lynch and Judge Stanley Sporkin, both former directors of the Division of Enforcement have already testified before the Senate Securities Subcommittee about their belief that the proposed emergency cease and desist authority needed to be circumscribed. For example, Gary questioned whether it was appropriate that emergency authority could be used, ex parte, to stop a major tender offer. I also expect ABA committees or members of the securities bar may have criticisms of the proposals.

I welcome a healthy debate on the Commission's proposals. I myself have concerns about the final shape of the bill, what interpretations will be made in the section by section analysis, committee report, and floor debate.

For example, the proposed legislation seeks to permit temporary orders on an ex parte basis. While under Rule 65(d) of the Federal Rules of Civil Procedures federal courts may issue ex parte temporary restraining orders, there are significant safeguards limiting the grant of ex parte TROs. No comparable limitations were included in the proposed legislation.

Instead the legislation limits the entry of temporary C&D orders only to the extent the Commission must find that a violation or threatened violation, or continuation of a violation is likely to result in "dissipation or conversion of investor assets, significant harm to investors, or substantial harm to the public interest, including but not limited to, losses to" SIPC prior to the completion of a hearing on a permanent cease and desist order. The legislation provides that emergency orders may be immediately appealed to a Federal district court.

However, entry of an ex parte emergency order, even for a brief period of time, could be devastating to a respondent. The mere fact that a TRO must be sought from a life-tenured Article III judge provides safeguards that may be absent in proceedings before a five person, politically appointed administrative tribunal, which has significant prosecutorial functions, and whose chairman hires the enforcement division director, recommends the division's budget, and is closely identified with the success of the Division's program.

To command respect for the Commission's new procedures and to maintain the high level of respect already accorded the Commission's enforcement program, the implementation of the proposed new enforcement powers must be carefully thought through.

Based on those reactions to the legislation I have already heard, I am persuaded that it may be appropriate to limit ex parte, emergency cease and desist orders to regulated entities, or to provide that even an emergency order must allow for some form of notice and hearing. Also, it may be necessary to provide not only that a respondent may appeal an adverse ruling, but that a court must hear the appeal, or a request for stay, on an expedited basis.

When will the Commission use its new C&D authority, and when will it still seek an injunction? C&D authority provides needed flexibility, and may provide needed speed in the adjudicative process. But it also carries risks of changing the nature of Commission actions in unintended ways, or clogging our own administrative processes.

My own view at this time is that while expanded enforcement authority is needed, I would expect to see most of the cases we currently bring still brought in federal court. However, I would expect cases involving clear violations which are currently put on hold pending completion of an exhaustive investigation, to proceed with a cease and desist proceeding. I would also expect cases that do not rise to a level requiring court action -- such as failure to file Forms 3 and 4, and certain offering cases, to be brought administratively. There are also cases against regulated entities currently brought as injunctive actions, which properly should be administrative proceedings if we can order disgorgement or assess fines.

Some have suggested that if the Commission seeks to impose penalties in a substantial number of cases, fewer defendants or respondents will settle, and we will become mired in litigation. While, for the reasons I discussed earlier, predictions of a litigation explosion may be overdone, we should continue to consider the risk of conducting more litigation at the expense of, more or faster investigations. The mere possibility of more litigation, however, is not a strong argument against passage of the proposed remedies bill. If a rise in litigation does take place, and even if, with the new resources we expect to receive, a tide of rising litigation threatens our ability to conduct investigations, we can, at that point, make the necessary accommodations to settle additional cases.

The hard fact is that the Commission, at least today, does not have enough senior, experienced litigators, or enough trial support staff to pursue actively all the claims we might like to see pursued. As a result, I and the other commissioners do accept settlements -- especially outside the insider trading area -- where the sanction is not set as high as I would like. We balance the competing needs of the enforcement program already -- and will continue to do so if the proposed bill is passed.

What should be a matter of paramount concern is what policy will guide the Commission's decisions when penalties are sought. The proposed legislation includes a list of factors the Commission may consider in imposing penalties. It is important that we assess penalties on the facts of the particular case, not by formula. The proposed remedies are necessary for some cases, but not all.

VI. CONCLUSIONS

I would welcome authority from Congress to permit the Commission to seek penalties in cases involving violations other than insider trading, to provide for expanded jurisdiction to bring administrative proceedings, to order disgorgement in administrative proceedings, and to order penalties in administrative penalties involving regulated entities.

The enforcement program achieves just results, and has done an effective job policing our markets. But there is room for improvement -- and more flexible remedies should make more effective enforcement possible.

The savings and loan and Wall Street scandals demonstrate that the financial markets have become so large, so complex, so far-flung and so fast-paced additional enforcement resources and remedies are necessary for the Commission. Strengthening of the Commission's enforcement remedies is part of a broader commitment by society and the federal government to make white collar criminals pay for their crimes, to present truthful information about economic activities, and to restore to injured parties that which they have lost.

I have only touched on a few of the features in the proposed Enforcement Remedies Bill which merit your attention. I look forward to your participation in the debate on all issues raised by these proposals. Thank you.

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