Fordham Journal of Corporate & Financial Law

Volume 13, *Issue* 2 | 2008 | *Article* 1

The Eighth Annual A.A. Sommer, Jr. Lecture on Corporate, Securities, and Financial Law

William Michael Treanor* Ben A. Indek†
Jill E. Fisch‡ Paul S. Atkins**

*
†
‡
**

LECTURE

THE EIGHTH ANNUAL A.A. SOMMER, JR. LECTURE ON CORPORATE, SECURITIES, AND FINANCIAL LAW[†]

WELCOME

William Michael Treanor[1]
Fordham University School of Law

OPENING REMARKS

Ben A. Indek[2]
Morgan, Lewis & Bockius LLP

INTRODUCTION

Jill E. Fisch[3]
Fordham University School of Law

FEATURED LECTURER

Paul S. Atkins[4]
United States Securities and Exchange Commission

[†] Paul S. Atkins delivered this address at Fordham University School of Law on October 9, 2007. It has been edited to remove minor cadences of speech that appear awkward in writing and to provide sources and references to other explanatory material in respect of certain statements by the speakers.

1. William M. Treanor is the Dean and Professor of Law at Fordham University School of Law.

2. Ben A. Indek is a Partner in the securities litigation practice of Morgan, Lewis & Bockius LLP.

3. Jill E. Fisch is the T.J. Maloney Chair in Business Law at Fordham University School of Law and is the Director of the Fordham Corporate Law Center.

4. Paul S. Atkins is a Commissioner of the U.S. Securities and Exchange Commission.

WELCOME

DEAN TREANOR: Hello, everyone. My name is Bill Treanor. I'm the Dean of Fordham Law School. It's my incredible pleasure to welcome you to tonight's A.A. Sommer, Jr. Lecture.

This is an event that speaks very profoundly to what the law school is about. We have had, for a long time, one of the strongest business law programs in the nation. I think a number of years ago, in the most recent ranking, we were ranked in the top twenty,[5] and our sights are on moving to the very top.

We have an incredible faculty—it's always dangerous when I do this, because I can't see everyone—starting with Professor Gus Katsoris,[6] who I think is our most senior faculty member, and Professor Steve Thel.[7] In the last couple of years, we have had some extraordinary recent hires, people who are really incredible stars and rising stars in the area of corporate law, Richard Squire[8] and Sean Griffith.[9] We have a fabulous corporate law journal, *The Journal of Corporate & Financial Law*,[10] which was actually cited in 2005 by the Supreme Court in the *Arthur Andersen* case.[11] We have incredible alumni. So those are really the bases for an extraordinary business law program.

To top it off, we have a Corporate Center,[12] which is designed to really mesh leading, cutting-edge theory and cutting-edge practice. It is

---

5. *See* Brian Leiter's Law School Rankings, Faculty Quality in the Business Law Areas 2003-04, http://www.leiterrankings.com/faculty/2003faculty_businesslaw.shtml (last visited Feb. 7, 2008).

6. Constantine N. Katsoris is the Wilkinson Professor of Law at Fordham University School of Law.

7. Steven Thel is the Wormser Professor of Law at Fordham University School of Law.

8. Richard C. Squire is an Associate Professor of Law at Fordham University School of Law.

9. Sean J. Griffith is a Professor of Law at Fordham University School of Law.

10. For more information, please visit the Fordham Journal of Corporate & Financial Law website, http://law.fordham.edu/jcfl.htm (last visited Feb. 7, 2008).

11. *See* Arthur Andersen LLP v. United States, 544 U.S. 696, 704 (2005) (citing Christopher R. Chase, *To Shred or Not to Shred: Document Retention Policies and Federal Obstruction of Justice Statutes*, 8 FORDHAM J. CORP. & FIN. L. 721 (2003)).

12. For more information, please visit the Fordham Corporate Law Center website, http://www.fordham.edu/law/faculty/fisch/source.html (last visited Feb. 7, 2008).

the brainchild of John Peloso,[13] joining us as one of our graduates, who really moved us forward and saw the possibilities of this. Our current chair, Paul Soden,[14] who is a great leader in the business law area, has dedicated himself to our Corporate Law Center. We have one of the leading corporate law scholars in the country heading it, Jill Fisch, who is not just a brilliant corporate law scholar that has brought incredible energy to this program, but she also can do literally anything. I don't know if you saw her earlier moving the podium so it would be in exactly the right spot. The classic "no job too big or small" describes Professor Fisch. She is assisted by Professor Caroline Gentile,[15] who comes to us with a background in economics, who has just done extraordinary work, and the Executive Director of the Corporate Center, Ann Rakoff,[16] who has done a fabulous job.

So we have a fabulous business law faculty, fabulous alumni, a fabulous Corporate Center, and then we have this program, which is really one of our gems, the A.A. Sommer, Jr. Lecture.

We are joined tonight by Starr Sommer.[17] Thank you so much for coming here to be with us tonight. As well as Susan and Jeff Futter,[18] thank you, your presence here means so much.

Ben Indek, who really did so much to put this evening together, with the support of Morgan Lewis, will be doing the introduction for SEC Commissioner Atkins. But I just want to say a little bit about how delighted we are to have him here today. Just to put it in context, literally every day we have an event here in this amphitheater. They are fabulous. It's amazing what great programs we have. But the draw on this is amazing. Not only is this room filled, with people in the back, but we have an overflow room, where Professor Sean Griffith is—or so I have been assured. Just to put that in context, this is my sixth year as dean. Eliot Spitzer did not get an overflow room;[19] only John Paul

---

13. John F.X. Peloso is Senior Counsel at Morgan, Lewis & Bockius LLP and an Adjunct Professor of Law at Fordham University School of Law.

14. Paul A. Soden is a Partner at Thompson Hine LLP, chairman of the Board of Advisors of the Fordham Corporate Law Center, and an Adjunct Associate Professor of Law at Fordham University School of Law.

15. Caroline Gentile is an Associate Professor of Law at Fordham University School of Law.

16. Ann Rakoff is the Executive Director of the Fordham Corporate Law Center.

17. Starr Sommer is the widow of Al Sommer, Jr.

18. Susan Futter is the daughter of Al Sommer, Jr. and Jeff Futter is the son-in-law of Al Sommer, Jr.

19. *See The Fifth Annual Albert A. DeStefano Lecture on Corporate, Securities &*

Stevens got an overflow room.[20] [Commissioner Atkins] very thoughtfully did a very interesting op-ed piece[21] and placed it as a way to kind of gin up a bigger crowd.

This is a very special moment. I could not be happier. It brings together our business law commitment, our fabulous Corporate Center, one of the stars, literally, of our Corporate Center program, and a particularly fabulous speaker. Without any further ado, let me present Ben Indek, who has done a great job in putting this all together.

OPENING REMARKS

MR. INDEK: Good evening, and welcome, everybody, to the Eighth Annual A.A. Sommer, Jr. Lecture.

Morgan Lewis created this event in honor of our partner who started our securities law practice. Al Sommer was a Morgan Lewis partner from 1979 to 1994. At that time, he became counsel to the firm. Al was a giant of the securities bar, with particular expertise in corporate finance and accounting issues. Al served as an SEC commissioner from 1973 to 1976.[22] Later, he was chairman of the Public Oversight Board of the American Institute of [Certified Public Accountants].[23] In private practice, he was counsel to many entities and a prolific author and commentator on a wide range of securities law topics.

In preparing for my remarks tonight, I found several interesting documents from Al's tenure at the Commission on the SEC Historical Society website.[24] By the way, the Historical Society is also a sponsor of this lecture, and we appreciate its support. In particular, I noticed on

Financial Law, 11 FORDHAM J. CORP. & FIN. L. 1 (2005) (featuring the speech delivered by Elliott Spitzer, former New York Attorney General and former Governor of the State of New York) [hereinafter *Fifth Annual DeStefano Lecture*].

20. *See* John Paul Stevens, "Learning on the Job," Remarks at the Fordham University School of Law Centennial Conference: The Jurisprudence of Justice Stevens (Sept. 30, 2005), *available at* http://law.fordham.edu/newsfiles/news-stevens.pdf.

21. Paul S. Atkins, Editorial, *Just Say 'No' to the Trial Lawyers*, WALL ST. J., Oct. 9, 2007, at A17 [hereinafter Atkins, *Just Say No*].

22. *See* Interview by Richard M. Phillips with A.A. Sommer, Jr., Former SEC Commissioner, in Washington, D.C. (Oct. 1, 2001), *available at* http://www.sechistorical.org/collection/oralHistories/interviews/sommer/sommer110101Transcript.pdf.

23. *Id.*

24. *See* SEC Historical Society, http://www.sechistorical.org (last visited Feb. 7, 2008).

the website several of Al's speeches from the mid-1970s and an interview that he gave to the Historical Society shortly before his passing. In those materials I noted certain striking similarities between Al and Commissioner Atkins. Al was, and Commissioner Atkins is today, passionate about the securities laws. Moreover, while at the Commission, both were willing to openly question the status quo.

In a September 1973 speech regarding the role of disclosure in the securities markets, Al stated—and I'm quoting—"I, for one, think that it is good that this fundamental premise of our regulatory system be reviewed and criticized."[25] Anyone who has heard or read speeches delivered by Commissioner Atkins will know that he, too, does not shrink from careful scrutiny of both new and old securities law initiatives. To cite one example, in his recent remarks before the Security Traders Association of Boston, Commissioner Atkins, in discussing reports critical of the U.S. capital markets, stated his belief—and I'm quoting again—"that the Commission is duty-bound to analyze, understand, and, if warranted, respond to these and other report recommendations that pertain to us."[26] In today's *Wall Street Journal*, as Dean Treanor mentioned, the article that Commissioner Atkins put in an op-ed, the *Stoneridge* case, is another example of his frank comment on topical issues.[27] I am confident that Al would have relished the opportunity to listen to the candid views of Commissioner Atkins tonight.

Al was present at the first two lectures to introduce our speakers, but passed away in 2002, after a long illness. His family continues its close relationship to our firm and to participate in these lectures. As mentioned by Dean Treanor, we are joined here tonight by his wife Starr, his daughter Susan, and his son-in-law Jeff. We are honored that they could attend this lecture.

Al joined our firm twenty-eight years ago to establish and expand the securities regulatory practice. Today we have more than 100 lawyers in seven cities throughout the country devoted to providing

25. A.A. Sommer, Jr., Commissioner, SEC, "Required Documentation in the Stock Market: The Other Side," Address Before the Conference Board 4 (Sept. 27, 1973), *available at* http://www.sechistorical.org/collection/papers/1970/1973_0927_Sommer Disclosure.pdf.

26. Paul S. Atkins, Commissioner, SEC, Remarks Before the Security Traders Association of Boston (Sept. 13, 2007), *available at* http://www.sec.gov/news/speech/2007/spch091307psa.htm.

27. *See* Atkins, *Just Say No*, *supra* note 21.

advice regarding the securities laws.[28] We practice in the regulatory, enforcement, litigation, broker-dealer, investment adviser, investment company, public-company accounting, and corporate governance areas.[29] In short, we continue to broaden and strengthen the foundation Al originally built. We are proud of Al's affiliation with Morgan Lewis and delighted to sponsor this annual lecture in his honor.

I am pleased to cede the podium to Jill Fisch, Director of Fordham's Corporate Law Center and our host this evening. Thank you for coming.

INTRODUCTION

PROF. FISCH: Good evening. I'm Jill Fisch and I'm Director of the Fordham Corporate Law Center.

On behalf of Fordham Law School, I want to take this opportunity to thank Ben Indek and to extend a particular thanks to the firm of Morgan, Lewis & Bockius for establishing the Sommer Lecture and for their continued support and partnership with the law school. I know many alumni of the Morgan Lewis firm are here tonight. The firm has really gone out of its way to help make this a very special event. I am delighted that our good friends, the members of Al Sommer's family, are here and continue to attend this event. It's just delightful to have them. I am pleased that the SEC Historical Society continues to come and partner with us. Of course, I want to welcome SEC Commissioner Paul Atkins.

This evening's lecture, the A.A. Sommer, Jr. Lecture, is one of the capstones of our program here at the Corporate Law Center. As you know, our speakers have included a panoply of leaders from the SEC,[30] the NASD,[31] and the PCAOB.[32] Last year we reached across the Atlantic to hear from Margaret Cole,[33] Director of Enforcement at the

---

28. *See* Morgan, Lewis & Bockius LLP, http://www.morganlewis.com (last visited Feb. 7, 2008).

29. *See id*.

30. United States Securities and Exchange Commission. For more information, please visit the SEC website, http://www.sec.gov/ (last visited Feb. 7, 2008).

31. National Association of Securities Dealers. The NASD consolidated into the Financial Industry Regulatory Authority (FINRA) in July 2007. For more information, please visit the FINRA website, http://www.finra.org/ (last visited Feb. 7, 2008).

32. Public Company Accounting and Oversight Board. For more information, please visit the PCAOB website, http://www.pcaobus.org (last visited Feb. 7, 2008).

33. *The Seventh Annual A.A. Sommer, Jr. Lecture on Corporate, Securities and*

U.K. Financial Services Authority[34]—or, I should say, the FSA, as long as I'm on acronyms. At other recent events, we hosted—then New York Attorney General, now Governor—Eliot Spitzer[35] and Congressman Oxley.[36] I want to point out that Congressman Oxley also did not command an overflow room.

Our upcoming programs include a roundtable on directors' and officers' liability insurance,[37] an academic conference featuring Vice Chancellor Leo Strine[38] as the keynote speaker, and a terrific lecture series geared specifically for our students. We are delighted with the work that our student partners are doing on the *Fordham Journal of Corporate & Financial Law*, which, let me point out, is one of the first specialized business law journals in the country. I want to thank the *Journal* students for their work here tonight as well.

SEC Commissioner Paul Atkins was appointed to the Commission in 2002, making him the longest-serving current member of the Commission.[39] Incidentally, he was appointed on July 29, 2002, which, according to my records, is the day before the effective date of the Sarbanes-Oxley Act.[40] His tenure, particularly in those challenging times, adds a degree of stability to a Commission that has experienced both numerous challenges and fairly frequent personnel changes, and is obviously continuing to experience those changes.

Financial Law: "The U.K. FSA: Nobody Does It Better?," 12 FORDHAM J. CORP. & FIN. L. 259 (2007) (featuring the speech delivered by Margaret Cole, U.K. FSA Director of Enforcement) [hereinafter *Cole Lecture*].

34. For more information, please visit the FSA website, http://www.fsa.gov.uk (last visited Feb. 7, 2008).

35. *See Fifth Annual DeStefano Lecture*, *supra* note 19; *see also* Fordham Corporate Law Center, Highlights of Prior Programs, http://www.fordham.edu/law/faculty/fisch/priorprograms.html (last visited Feb. 7, 2008).

36. *See* Fordham Corporate Law Center, Highlights of Prior Programs, http://www.fordham.edu/law/faculty/fisch/priorprograms.html (last visited Feb. 7, 2008); *see also* Michael G. Oxley—Biography, http://bioguide.congress.gov/scripts/biodisplay.pl?index=O000163 (last visited Feb. 7, 2008).

37. *See* Fordham Corporate Law Center, http://www.fordham.edu/law/faculty/fisch/source.html (last visited Feb. 7, 2008).

38. *See* Leo Strine—Biography, http://courts.delaware.gov/Courts/Court%20of%20Chancery/?jud_off.htm (last visited Feb. 7, 2008).

39. *See* Paul S. Atkins—Biography, http://www.sec.gov/about/commissioner/atkins.htm (last visited Feb. 7, 2008) [hereinafter Atkins Biography].

40. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 11, 15, 18, 28 and 29 U.S.C.).

Commissioner Atkins also adds a degree of stability to the Commission's regulatory policy. I think it's fair to describe his perspective, in general, as that of a classic conservative, in that he has tended to oppose overzealous regulatory reactions in response to high-profile scandals. In the mutual fund area, for example, we had the scandals dealing with late trading and market timing.[41] He repeatedly opposed the Commission's rules requiring greater director independence and a separate chairman, arguing that the rules were not cost-justified and that they would fail to solve the conflict-of-interest problems in the industry.[42] His views were vindicated when the D.C. Circuit struck down the rules.[43]

He vigorously opposed hedge fund registration, arguing that the Commission had failed to consider other viable alternatives.[44] Once again, the courts agreed with him.[45]

Most recently, Commissioner Atkins has criticized the strong regulatory reaction to the options backdating scandals, observing that the scandals have, in many ways, obscured the fact that options are and remain a legitimate and desirable form of executive compensation.[46]

Commissioner Atkins brings to these varied topics a common perspective: that regulators should hesitate to step in and interfere with the market's ability to discipline business practices. As he told *Business Week*—and I quote—"Markets have great power to discipline people. We shouldn't try to second-guess them."[47]

The interplay between regulation and the markets raises complex issues in a number of areas that are currently before the SEC. The Commission continues to struggle with the implementation of Sarbanes-

---

41. *See* Edward Chancellor, Editorial, *Scandals Seem Bad Now? Just Wait*, WALL ST. J., May 27, 2006, at B14.

42. *See* Alan R. Palmiter, *Mutual Fund Voting of Portfolio Shares: Why Not Disclose?*, 23 CARDOZO L. REV. 1419, 1473 (2002).

43. *See* U.S. Chamber of Commerce v. SEC, 443 F.3d 890 (D.C. Cir. 2006) (vacating the 75% independent director and independent chair requirements).

44. Kim Clark, *SEC Commissioner: More Financial Regulation Not Needed*, U.S. NEWS & WORLD REP., Sept. 11, 2007.

45. *See* Goldstein v. SEC, 451 F.3d 873 (D.C. Cir. 2006).

46. Helen Shaw, *Atkins Warns of Overreaction in Options Furor*, CFO MAG., July 7, 2006, *available at* http://www.cfo.com/article.cfm/7155885/c_7154782.

47. Amy Borrus, *Dr. No Digs in at the SEC; Commissioner – and Fierce Libertarian – Paul Atkins is Slowing Some Key Reforms*, BUS. WK., Feb. 14, 2005, at 76.

Oxley, particularly with the regulation of the accounting industry.[48] The scandals that led to the statutory reform raised critical questions about the extent to which we should defer to self-regulation and industry standards, particularly with respect to those who, by statute, are responsible for safeguarding the integrity of public-company financial statements.

The Commission faces ongoing challenges in overseeing the conversion of our exchanges and market structures to private, for-profit entities, entities with increasingly global operations and increasingly complex ownership structures.[49] And the Commission must decide how to reconcile its decades-long, intensive oversight of the solicitation of proxies with market pressures that are placing increasing importance on shareholder voting, pressures that include greater shareholder efforts to nominate directors, "say on pay," and the increasing importance of professional proxy advisers.[50]

Commissioner Atkins is prepared for these challenges and welcomes the opportunity to carefully consider the changing role of SEC regulation in protecting the capital markets. As you saw from this morning's op-ed piece, he has given a lot of thought to these issues.[51] Let me make it clear that, while he and I don't share the same perspective on all of these topics—some of you may be aware that I filed an amicus brief on the other side of the *Stoneridge* case,[52] the case that was argued before the Supreme Court today—I cannot express enough respect for the knowledge, the expertise, and the care that he brings to his viewpoints and his perspectives.

---

48. Timothy L. Weston, *Sarbanes-Oxley Section 404 Under Siege: Solutions for Solving the Problems of Implementing Section 404*, CONSUMER FIN. L.Q. REP., Spring 2006, at 86.

49. *See A Review of Self-Regulatory Organizations in the Securities Markets: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs* (Mar. 9, 2006) (testimony of Marc E. Lackritz, President, Sec. Industry Ass'n), *available at* SIFMA, http://www.sifma.org/legislative/testimony/archives/Lackritz3-9-06.html; Aaron Lucchetti, *As Exchanges Become Profit-Seekers, Concerns Rise Over Risk to Investors*, WALL ST. J., Nov. 8, 2005.

50. *See* Jeremy Grant, *Call to Postpone SEC 'Proxy Access' Vote*, FIN. TIMES, Oct. 30, 2007.

51. *See* Atkins, *Just Say No*, *supra* note 21.

52. *See* Brief for Professors James D. Cox et al. as Amici Curiae Supporting Petitioners, Stoneridge Inv. Partners LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 1701606.

Raised in Florida, Commissioner Atkins spent more than twenty years focusing on the financial services industry and securities regulation. Prior to his appointment, his work included internal compliance investigations and consulting for financial firms. In the largest of these investigations, he served as Crisis President—which I think is a cool title—for the sole surviving subsidiary of the Bennett Funding Group, a billion-dollar leasing company that perpetrated the largest Ponzi fraud in U.S. history, in which more than 20,000 investors lost much of their investment.[53] By stabilizing the company's finances and operations and rebuilding the firm's business, Commissioner Atkins improved firm share value by almost 2,000%.[54]

From 1990 to 1994, Commissioner Atkins served on the staff of two former chairmen of the SEC, Richard Breeden and Arthur Levitt, ultimately as executive assistant and counselor, respectively.[55] Under Chairman Levitt, he was particularly involved in the SEC's efforts to educate individual investors, efforts that included organizing the first investor town hall meetings, an SEC consumer affairs advisory committee, and the original *Invest Wisely* brochures regarding the fundamentals of the retail brokerage relationship and mutual fund investment, topics that, as I said, continue to be of great importance today.[56]

Commissioner Atkins received his J.D. from Vanderbilt University School of Law, where he was senior student writing editor of the *Vanderbilt Law Review*.[57] He received his B.A. from Wofford College and was a member of Phi Beta Kappa.[58]

It's my great pleasure to welcome him here tonight and to introduce you to Commissioner Paul Atkins.

FEATURED LECTURER

COMMISSIONER ATKINS: Thank you, Ben [Indek], for that kind introduction. Thank you also, Dean Treanor, [Professor] Jill Fisch, and Mrs. Sommer. Before I get started, and as all of you may expect, I need to tell you that the comments that I am about to make are my own and

53. Atkins Biography, *supra* note 39.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*

do not necessarily reflect official SEC policy or the opinions of my fellow commissioners.

It is a true honor to be with you here today. Over the last eight years, this lecture has become a prominent feature in the ongoing dialogue among securities regulators, practitioners, and the regulated community. That is fitting, given that the lecture honors the legacy of former SEC Commissioner and former securities law practitioner, Al Sommer. The SEC has seen many commissioners come and go over the last seventy-three years, and it would be difficult for even the most seasoned SEC veteran to name them all, much less point out their legacy. But I am sure that many of even the newest securities practitioners have heard of Al Sommer and his legacy at the Commission. At the SEC, Commissioner Sommer was extremely well-regarded for his efforts to eliminate fixed commissions in the brokerage industry and his work in creating and overseeing an advisory committee on corporate disclosure that eventually resulted in the promulgation of Regulation S-K.[59] Among other things, Regulation S-K was a much needed rationalization of the corporate disclosure rules;[60] for once, there was essentially one place to go to find a set of integrated requirements. After he left the SEC, Commissioner Sommer made his mark in private practice, primarily at Morgan, Lewis & Bockius, and in his role in the accounting industry's Public Oversight Board and the American Institute of Certified Public Accountants.[61]

From a personal perspective, I very much enjoyed working with Al. When I worked for Chairman Richard Breeden in the early 1990s, Al was a great adviser and was always ready to help us accomplish what needed to be done. For example, you might not think of Al as a party planner, but when we were searching for a way to be able to host the 16th annual conference of the International Organization of Securities Commissions,[62] Al stepped in to head up a private committee that hosted several events to showcase the best and the brightest of the American capital markets for several hundred international guests. At the time, the SEC had no budget for that sort of thing. Al was also immensely kind.

59. 7 C.F.R. § 229.10 (2008).

60. *See id.*

61. American Institute of Certified Public Accountants. For more information, please visit the AICPA website, http://www.aicpa.org/ (last visited Feb. 7, 2008).

62. For more information, please visit the IOSCO website, http://www.iosco.org/ (last visited Feb. 7, 2008).

After I left the SEC, he continued to be a kind and helpful friend and advisor.

I am honored to deliver this lecture tonight in Commissioner Sommer's memory, particularly in the presence of his widow, Starr Sommer, his daughter and son-in-law.

This evening I would like to talk about an issue that barely preceded, but substantially affected, Commissioner Sommer's tenure at the SEC. Before I reveal the topic, some background is in order.

The SEC is fast approaching the 75th anniversary of its creation. Next year, of course, marks the 75th anniversary of the Securities Act of 1933.[63] Thereafter, the Securities Exchange Act of 1934 established the SEC to keep the Federal Trade Commission out of the securities markets,[64] which is a story full of political intrigue itself, and endowed it with a wide array of powers.[65] Through legislative amendments, those powers have expanded since 1934[66] and the SEC also was charged with the administration of the federal securities statutes.[67] Today, the SEC is charged with administering the Trust Indenture Act of 1939,[68] the Investment Company[69] and the Investment Advisers Acts of 1940,[70] and certain provisions of the Sarbanes-Oxley Act,[71] some of which fall

63. Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (2006).

64. Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78nn (2006).

65. *See id.*; *see generally* Securities and Exchange Act of 1934, http://www.sec.gov/about/laws.shtml#secexact1934 (noting some of the many powers granted by the 1934 Act, including regulating corporate reporting, proxy solicitations and tender offers).

66. *E.g.*, Trust Indenture Act of 1939, 15 U.S.C. §§ 77aaa-77bbbb (2006); Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 to a-64; *see generally* U.S. Securities and Exchange Commission, http://www.sec.gov/about/laws.shtml (listing and explaining several key legislative acts created since the 1934 Act).

67. *See* sources cited *supra* note 66.

68. The Act applies to debt securities such as bonds, debentures, and notes that are offered for public sale. Trust Indenture Act of 1939, 15 U.S.C. §§ 77aaa-77bbbb (2006).

69. The Act regulates the organization of companies, including mutual funds, that engage primarily in investing, reinvesting, and trading in securities, and whose own securities are offered to the investing public. Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 to a-64 (2006).

70. The Act regulates investment advisors. Investment Advisors Act of 1940, 15 U.S.C. §§ 80b-1 to b-21 (2006).

71. The Act mandated a number of reforms to enhance corporate responsibility and financial disclosures and to combat corporate and accounting fraud. It also created the Public Company Accounting Oversight Board to oversee the activities of the auditing profession. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002)

outside of the earlier securities laws. That is a lot of statutory responsibility, but at least we finally were able to shed the responsibility for the now-dead Public Utility Holding Company Act of 1935.[72]

The SEC was created to be, and remains, primarily a disclosure agency. In pursuing its statutory missions of protecting investors; maintaining fair, orderly, and efficient markets; and facilitating capital formation, the SEC since its inception has mandated public disclosure of current and accurate information from issuers and regulated entities. The theory behind a rigorous disclosure regime is that investors should have current, materially complete, and accurate information to make educated, informed investment decisions. At the same time, however, investors should enter into the markets knowing that there is no governmental insurance policy protecting them from unwise decisions. Often, however, despite Commissioner Sommer's legacy in Regulation S-K and efforts by others to promote transparency, disclosure rules are not enough. Therefore, a necessary corollary to a disclosure regime is a program of strong enforcement. If you make materially false disclosures or if you omit required disclosures, the SEC has and can bring a cause of action against you.[73] With that in mind, Congress has given the SEC strong enforcement powers in the federal securities laws. These powers have evolved—and increased—over time through legislation, regulation (just look at Rule 10b-5), and judicial interpretations. To be sure, the arsenal of enforcement remedies possessed by today's SEC, including the ability to penalize corporations, is markedly different from the stop orders and injunctions of 70 years ago.

The current SEC enforcement program is highly visible and highly regarded. The Division of Enforcement now has over eleven hundred staff members located in the home office in Washington and in the eleven regional offices.[74] The staff brings hundreds of enforcement recommendations to the Commission each year (who's counting, right?) and many other matters are investigated and then closed. The

(codified in scattered sections of 11, 15, 18, 28 and 29 U.S.C.).

72. The Act provided for the regulation of electric utilities by the SEC. Public Utility Holding Company Act of 1935, 15 U.S.C. § 79 (repealed 2006).

73. *See id.* (stating that it is unlawful to make any untrue statement of a material fact or to omit to state a material fact).

74. The Division of Enforcement has regional offices in New York, Boston, Philadelphia, Miami, Atlanta, Chicago, Denver, Fort Worth, Salt Lake, Los Angeles, and San Francisco. U.S. Securities and Exchange Commission, About the Division of Enforcement, http://sec.gov/divisions/enforce/about.htm (last visited Feb. 7, 2008).

enforcement staff investigates and recommends cases involving a wide range of activities, including Ponzi and pyramid schemes, bogus offerings, untrue disclosure, insider trading, market manipulation, a new wave of Internet intrusion matters, and the more esoteric, often very controversial, accounting cases.[75] In every substantive area and in all of the SEC's far-flung offices, the staff of the Division of Enforcement proves themselves every day to be professionals of the first rate.

It comes as a surprise to many when they hear that the SEC has only had a standalone division of enforcement for 35 years—since 1972.[76] For the preceding 38 years of the Commission's existence, enforcement was a function handled within each of the various regulatory divisions, but primarily in the Division of Trading and Markets.[77]

I will not go into a whole lot of detail about the first 38 years of the Commission's enforcement efforts. However, that history plays a critical part in the evolution of the Enforcement Division, and so I will commend to your reading an article written by Dan Hawke, the director of the SEC's Philadelphia Regional Office, for the SEC Historical Society.[78] That article, which you can find on the historical society's website, is very comprehensive. Many thanks to Dan Hawke for producing such an excellent piece—the quality of his work certainly comes as no surprise to me.

I would like to focus on one event in the history of the SEC's enforcement program that may well have been "the big bang" from which the current Division of Enforcement was born. That event was the Wells Committee review back in 1972. The Committee was a formal advisory committee created by Chairman William Casey. In a

---

75. *See* Terence J. Lynam, *Going to Trial Against the SEC*, 26 BANKING & FIN. SERVS. POL'Y REP. 5 (2007) (discussing the different types of litigation the SEC undertakes).

76. U.S. Securities and Exchange Commission, About the Division of Enforcement, http://www.sec.gov/divisions/enforce/about.htm (last visited Feb. 7, 2008).

77. The Division of Trading and Markets was renamed the Division of Market Regulation in 1972. However, in November 2007, the division reverted back to its previous title, the Division of Trading and Markets. U.S. Securities and Exchange Commission, http://www.sec.gov/divisions/marketreg/mrabout.shtml (last visited Feb. 7, 2008).

78. Theodore A. Levine & Daniel M. Hawke, *Sarbanes-Oxley: Back to the Future*, http://www.sechistorical.org/collection/papers/2000/2003_0301_CLE_Sarbanes_Oxley.pdf.

speech given to the New York State Bar Association in early 1972, Chairman Casey announced the formation of the committee, stating:

> [It is] essential for the Commission to redouble its efforts to keep in touch with the best thinking on investor protection at the private bar, in the accounting profession, and in the financial community generally. As one step—and I hope that it will prove a significant step—toward that end, I have created a special committee of three highly experienced practicing lawyers who will, at my request, examine the SEC's enforcement policy and practices, engage in frequent dialogue with the members of the Commission and with our staff, seek and sift the suggestions of the bar and make recommendations to the Commission for worthwhile improvements to our time-honored ways.[79]

Commissioner Casey appointed to constitute the Committee John A. Wells, who was in private practice at Royall, Koegel & Wells here in New York, and former SEC chairmen Manny F. Cohen and Ralph Demmler.[80] Specifically, because Jack Wells was not a securities lawyer, Chairman Casey asked him to be the chairman of the committee, and thus began what we now know as the Wells Committee.[81]

In line with the comments in Chairman Casey's speech, the committee's express mandate[82] was: (1) to advise on how the SEC's enforcement objectives and strategies may be made still more effective,[83] (2) to assess the due-process implications of the enforcement practices,[84] (3) to evaluate the enforcement policies and procedures,[85] (4) to make recommendations on the appropriate blend of regulation, publicity and formal enforcement actions and on methods of furthering voluntary compliance,[86] and (5) to make recommendations on criteria

79. William J. Casey, Chairman, SEC, "The Securities Bar and The Securities Laws," Address at the New York State Bar Association: Banking, Corporation and Business Law Section 4-5 (Jan. 27, 1972), *available at* http://sec.gov/news/speech/1972/012772casey.pdf (discussing the "Wells Committee," although the committee was not yet termed as such).

80. *Id.* at 5.

81. *Id.* at 5-6.

82. Memorandum from John A. Wells et al., Chairman, SEC Advisory Commission on Enforcement Policies and Practices (Mar. 1, 1972), *available at* http://www.sechistorical.org/collection/papers/1970/1972_0302_Casey.pdf.

83. *Id.* at 1.

84. *Id.*

85. *Id.*

86. *Id.* at 2.

for the selection and disposition of enforcement actions and on the adequacy of sanctions imposed in SEC proceedings.[87]

The Wells Committee did not conduct extensive independent research and analysis. Instead, the Committee solicited comment from "persons outside the Commission who were affected by the Commission's enforcement activities."[88] The Committee started its work in January 1972, and published a report with forty-three recommendations for the Commission in June of the same year.[89] Although some believe the Wells Committee specifically recommended a standalone enforcement division, that is not true. Chairman Casey, on his own initiative—but apparently with the advice of the Wells Committee—created the Enforcement Division shortly after the Wells Committee report was published.[90] Depending on whom you listen to, Chairman Casey was either trying to build a national, high-profile enforcement program or he was simply trying to get Irv Pollack[91] out of the regulation business. No matter the reason, few would say that the move was a bad one.

The most obvious product of the Wells Committee's efforts was the SEC's adoption of a formal "Wells process."[92] As most or all of you know, the Wells process allows for respondents in SEC proceedings to submit a writing—essentially a brief—to the Commission and its staff after the staff's investigation is completed, but before the staff has made a recommendation to the Commission.[93] In many ways, these "Wells Submissions," operate as a last clear chance for respondents to persuade

87. *Id.* at 2.

88. THE ADVISORY COMMITTEE ON ENFORCEMENT POLICIES AND PRACTICES, SECURITIES AND EXCHANGE COMMISSION, REPORT OF THE ADVISORY COMMITTEE ON ENFORCEMENT POLICIES AND PRACTICES (June 1, 1972), *reprinted in* ARTHUR F. MATHEWS ET AL., ENFORCEMENT AND LITIGATION UNDER THE FEDERAL SECURITIES LAWS 1973, at 285 (Practising Law Institute 1973) [herineafter WELLS REPORT].

89. *Id*. at 277-83.

90. The Division of Enforcement was created in August 1972, about two months after the Wells Committee Report was published. *See* Letter from William J. Casey, Chairman, SEC (Mar. 2, 1972), *available at* http://www.sechistorical.org/collection/papers/1970/1972_0302_Casey.pdf.

91. Irving Meyer Pollack—Biography, http://www.fulbright.com/index.cfm?fuseaction=attorneys.detail&site_id=301&emp_id=13229 (last visited Feb. 7, 2008).

92. *See* Joshua A. Naftalis, Note, *"Wells Submissions" to the SEC as Offers of Settlement under Federal Rule of Evidence 408 and Their Protection from Third-Party Discovery*, 102 COLUM. L. REV. 1912, 1912-13 (2002) (describing the Wells process).

93. *Id*. at 1913.

the staff that an enforcement recommendation is not warranted. If that fails, the Wells Submissions are submitted to the Commission, along with a staff recommendation memorandum, so respondents are assured that the Commission has both sides of the story when it considers a recommendation in a contested matter.[94]

As an aside, believe it or not, when I returned to the SEC as a commissioner after eight years back in the private sector, the practice had developed of not providing commissioners with Wells Submissions in settled cases. At the time, I was wondering why these materials for our closed Commission enforcement meetings had grown so thin! Well, I changed that practice right away, at least with respect to my own office, and asked for all Wells Submissions and all substantive correspondence that is functionally equivalent to Wells Submissions. It is very helpful to understand the evidence and the positions of all parties in the case, so I believe that the whole Commission should read Wells submissions even in settled matters.

The appellation "Wells submission" suggests that the Wells Committee conceived the idea of allowing a respondent to submit a brief with opposing views before final Commission action. However, the real credit for this process should go to former Chairman Hamer Budge[95] (who was also called Judge Budge from his service on the bench before he came to the SEC) and his fellow Commissioners.[96] So, instead of a "Wells Submission," we could call it a "Judge Budge Brief." A "Wells that Smells" because of shading facts or bad arguments could become a "Budge Fudge." A "Swell Wells," on the other hand, could become a "Budge Nudge," because it nudges the Commission in a different direction. A truly exceptional one could be called a "Hamer Famer" because of its fame and acclaim. A really long Wells—a "Hell's Wells," —would be a "Budge Trudge," because it takes so long to get through it.

94. *Id.*

95. Press Release, Securities and Exchange Commission, Statement of the Securities and Exchange Commission on the Death of Former Chairman Hamer H. Budge (July 28, 2003) (including a brief biography and obituary), *available at* http://www.sec.gov/news/press/2003-88.htm (last visited Feb. 7, 2008).

96. While the Wells Commission in fact proposed the so-called Wells Submission, Hamer Budge and those SEC Commissioners following him are responsible for setting in motion the events leading to the formation of the Commission, and for adopting its proposals. *See* U.S. Securities and Exchange Commission, Historical Summary of Commissioners, http://www.sec.gov/about/sechistoricalsummary.htm (last visited Feb. 7, 2008).

Seriously, though, my jokes should not be construed to take away from my deep respect for the important work and legacy of Hamer Budge and Jack Wells. I was just concerned that mid-way through my speech that you would be in high dudgeon if there were no levity (as a nod to my former boss, Arthur Levitt).[97]

So, back to history. In 1970, just months before Chairman Budge left the SEC, the Commission issued a memo to all the division directors and office heads regarding procedures to be followed in enforcement proceedings.[98] The memo had two significant components: (1) it required the staff to get Commission approval before engaging in any settlement discussions,[99] and (2) it required the staff to provide a summary of the defendant's arguments in recommendation memos sent to the Commission.[100] The latter requirement became a subject of study by the Wells Committee and resulted in the following Wells Committee recommendation to the Commission:

> Except where the nature of the case precludes, a prospective defendant or respondent should be notified of the substance of the Staff's charges and probable recommendations in advance of the submission of the Staff memorandum to the Commission recommending the commencement of an enforcement action and be accorded an opportunity to submit a written statement to the Staff which would be forwarded to the Commission together with the Staff memorandum.[101]

The Wells Committee also recommended that this process be formalized in SEC rules.[102] The Commission agreed with these recommendations, and they were eventually codified in SEC procedural rules.[103] However, because the Commission was faced with "strong opposition from its enforcement staff," the published version differed from the recommendation in a few respects. The most significant nod to

---

97. Arthur Levitt—Biography, http://www.sec.gov/about/commissioner/levitt.htm (last visited Feb. 7, 2008).

98. *See* Memorandum from the Commission to All Division Directors and Office Heads, Regarding Procedures Followed in the Institution of Enforcement Proceedings (Sept. 1, 1970), *reprinted in* SEC v. Nat'l Student Mktg. Corp., 68 F.R.D. 157, 165 app. A (D.D.C. 1975).

99. *Id*. at 165-66, app. A.

100. *Id*. at 166, app. A.

101. WELLS REPORT, *supra* note 88, at 279.

102. Naftalis, *supra* note 92, at 1918.

103. 17 C.F.R. § 202.5(c) (2006).

the staff was language stating that the staff would have discretion in deciding whether to advise a respondent of: the nature of the investigation, the potential charges, and the amount of time available to send a written submission.[104]

Unlike the Wells submission process, most of the Wells Committee recommendations were not adopted by the Commission.[105] Looking at the 43 recommendations,[106] it makes you wonder how things would be different today if the Commission had expressly addressed all of them 35 years ago. Indeed, many of the recommendations remain highly relevant today—and some should give the current Commission a serious case of déjà vu.

The first Wells Committee recommendation was for an SEC planning office "whose primary purpose would be to identify emerging regulatory and enforcement problems and to develop a coordinated response by the Commission."[107] Of course, a former chairman created just such a group—the Office of Risk Assessment—a few years ago in response to some of the scandals that the SEC had not anticipated.[108] Despite what would seem to be the timeless wisdom of a planning office, it has only had limited success. This is not because of a lack of talent in that particular office, but is probably due more to the SEC's ages-old problem with a lack of inter-division and inter-office cooperation. I hope that the Commission will soon be able to breathe new life into that office.

Recommendation 20 in the Wells Committee report is another blast from the past. That recommendation was for the Commission to "adopt procedures permitting discussions of settlement between the staff and the prospective defendant or respondent prior to authorization of a proceeding."[109] This was a response to the 1970 Chairman Budge memo. Apparently, some commenters in the Wells Committee process felt strongly that the settlement authorization procedures in the Budge memo should not be continued. Boy, does that sound familiar! Well,

---

104. *See id*.

105. *Compare* WELLS REPORT, *supra* note 88, *with* 17 C.F.R. § 202.5(c).

106. *See* WELLS REPORT, *supra* note 88.

107. *Id.* at 277.

108. *See* William Donaldson, Chairman, SEC, Speech to Detroit Economic Club (Oct. 29, 2004), *available at* http://www.sec.gov/news/speech/spch102904whd.htm (discussing corporate corruption scandals such as Enron and Worldcom, and the SEC's response).

109. WELLS REPORT, *supra* note 88, at 280.

the Casey Commission[110] did not agree, perhaps for due process concerns and to retain Commission prerogatives, so for all intents and purposes, the Budge memo and its procedures are still binding Commission policy today. In fact, in 1979, the Commission, under Chairman Harold Williams,[111] who was very concerned with due-process and procedure, formally adopted in the SEC procedural rules a requirement that the enforcement staff must have Commission authorization before engaging in settlement discussions.[112]

With all of this precedent, and considering that the 1979 rule is still on our books, it makes you wonder why there was so much clamor when the Commission recently started enforcing that policy in corporate issuer penalty cases. The backlash is especially odd given that the issuer penalty cases constitute about five percent or less of the SEC's annual enforcement docket.[113] I imagine that much of the criticism arises from a lack of public guidance on how the SEC is implementing this new policy—or should I say, this "new old" policy, and I would hope that—if the Commission decides to continue with the procedure—detailed formal guidance will be provided in the near future.

Several other of the Wells Committee recommendations deserve the attention of the current and future Commissions, and not all of them relate to with the enforcement function. For instance, recommendation 5 would have the Commission promptly reflect staff interpretive positions in published revisions of applicable rules and policies.[114] Because such revisions would be subject to the Administrative Procedure Act (APA), I believe that recommendation 5 was, and is, an appropriate idea. And, the problem of substantive staff guidance being provided outside the APA[115] is even more acute today than it was in 1972—we now have 35 years of additional staff guidance to deal with. Recently, for example, under Alan Beller, the Corporation Finance Division began to publish

110. "Casey Commission" refers to the period between April 14, 1971 and February 2, 1973 during which William J. Casey was Chairman of the SEC. U.S. Securities and Exchange Commission, Commissioner History, http://www.sec.gov/about/sechistoricalsummary.htm (last visited Feb. 7, 2008).

111. Harold M. Williams—Biography, http://skadden.com/index.cfm?contentID=45&bioID=848.

112. 17 C.F.R. § 202.5(f) (2006).

113. U.S. SECURITIES AND EXCHANGE COMMISSION, 2006 PERFORMANCE AND ACCOUNTABILITY REPORT 11 (2006), *available at* http://www.sec.gov/about/secpar/secpar2006.pdf.

114. WELLS REPORT, *supra* note 88, at 277.

115. Administrative Procedure Act, 5 U.S.C.S. prec. § 500 (LexisNexis 2007).

staff comment letters on disclosure filings so that all issuers and practitioners have access to the information.

As much as I would like to discuss each of the 43 recommendations with you, I realize that my time—and your patience—is limited. So I will mention only one more. In recommendation 13, the Wells Committee advised the Commission to ensure that examination and enforcement staff have, and maintain, proper polices and procedures manuals.[116] Although this recommendation may have been loosely and informally adhered to over the years, this issue has become a hot topic following the recent issuance of highly critical reports[117] by Senators Grassley[118] and Specter[119] and the Government Accountability Office (GAO).[120] Both of these reports find significant shortcomings with the Division of Enforcement's written policies and procedures.[121] This is a serious issue, and one I know and expect the Chairman, the Commission, and the Enforcement Division senior staff will carefully examine and remedy. I should not like others to criticize the SEC for being unresponsive if we do not consider these common-sense suggestions from Congress and from the GAO.

Although most of the recommendations proposed by the Wells Committee in its report were not adopted by the Commission, the Wells process remains the SEC's central due process mechanism in

116. WELLS REPORT, *supra* note 88, at 279.

117. *See* STAFF OF S. FINANCE COMM., 110TH CONG., REPORT ON THE FIRING OF AN SEC ATTORNEY AND THE INVESTIGATION OF PEQUOT CAPITAL MANAGEMENT (Comm. Print 2007), *available at* http://finance.senate.gov/sitepages/leg/LEG%202007/Leg%20 110%20080307%20SEC.pdf [hereinafter PEQUOT REPORT]; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-830, SEC: ADDITIONAL ACTIONS NEEDED TO ENSURE PLANNED IMPROVEMENTS ADDRESS LIMITATIONS IN ENFORCEMENT DIVISION OPERATIONS (2007), *available at* http://www.gao.gov/new.items/d07830.pdf [hereinafter GAO REPORT].

118. Senator Chuck Grassley—Biography, http://grassley.senate.gov/public/index.c fm?FuseAction=Biography.Home (last visited Feb. 7, 2008).

119. Senator Arlen Specter—Biography, http://specter.senate.gov/public/index.cfm? FuseAction=AboutArlenSpecter.Biography (last visited Feb. 7, 2008).

120. *See* GAO REPORT, *supra* note 117.

121. *See* PEQUOT REPORT, *supra* note 117 (criticizing the SEC's firing of SEC lawyer Gary Aguirre, alleging that political considerations were behind Aguirre's dismissal); GAO REPORT, *supra* note 117 (finding that the SEC's decentralized data management led to inefficiencies in investigation, staffing, and distributing monies to harmed investors, and that while steps are being taken to improve the situation, more must be done).

enforcement matters.[122] But, after 30 years, even the Wells process has its challenges. The corporate scandals of recent years and the market's jitters over the effect of potential enforcement problems on a corporation's management and business, combined with today's disclosure practices (and sky-high legal bills), make it difficult for the spirit of the Wells process—giving someone the ability to tell their side before the SEC takes public action—to run its course as originally intended.

I believe that advisory committees like the Wells Committee can play a key role in the review and improvement of SEC rules and processes, and in fact, they have performed such a function many times over the years. I, in fact, helped to set up for a number of them to good effect under Chairmen Richard Breeden and Arthur Levitt. Chairman Casey was exactly right—in order to satisfy the SEC's statutory missions, it is incumbent on the Commission to seek the best advice from outside sources, including the securities bar and the regulated community to refine the agency's policies and practices.[123] This is critical not only for our investor protection purposes, but also for the Commission to satisfy its mandates to facilitate capital formation and maintain fair, orderly, and efficient markets.[124]

To that end, I welcome the idea of new advisory committees to review the functions of our divisions and offices. In light of the many issues raised in the three recent capital markets competitiveness reports,[125] the 2006 Chamber of Commerce report on the SEC

---

122. *See* Rules of Practice, SEC Release No. 34-35833, 60 Fed. Reg. 32,738, at *160 (June 9, 1995) (stating that, in most cases, at the close of an investigation the SEC notifies the respondent of its general conclusions and affords the respondent an opportunity to submit a Wells Statement presenting its arguments against the commencement of an action).

123. The mission of the SEC is to protect investors, maintain fair, orderly and efficient markets, and facilitate capital formation. William J. Casey, Chairman, SEC, Address to the National Association of Investment Clubs: America Needs the Small Investor (Oct. 5, 1972), *available at* www.sec.gov/news/speech/1972/100572casey.pdf.

124. *See* 15 U.S.C. § 77b(b) (2007) ("Whenever pursuant to this subchapter the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.").

125. COMM. ON CAPITAL MKT. REGULATION, INTERIM REPORT OF THE COMMITTEE ON CAPITAL MARKETS REGULATION (Nov. 30, 2006), *available at* http://www.capmktsreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf; COMM'N

enforcement program,[126] and the Congressional[127] and GAO reports,[128] I think it is clear that this would be a good time for a new "Wells-like" advisory committee to review the policies and procedures of our enforcement program. The Commission and staff should welcome, not fear, such a review.

You all have been a very patient audience, and I appreciate your attention tonight. I welcome your active involvement in the issues I discussed today, and all of your issues. My phone and office are always open to you. Please call or stop by if you have any comments or concerns. Thank you again for your time and attention.

Professor Fisch has asked if I will take some questions. Since I am just keeping you away from your cocktails, I would be happy to do that for a while.

QUESTION: Commissioner Atkins, thanks for coming today.

In your op-ed this morning, you came out against private litigants taking action for the aiding and abetting of securities fraud.[129] Do you think that the SEC's current enforcement techniques are sufficient to discourage this type of behavior in the future? If not, what do you think about it?

COMMISSIONER ATKINS: That is a good question. I should probably repeat it for folks in the overflow room.

Basically, in light of the case that was argued today, *Stoneridge*,[130] do I think that the current SEC enforcement powers—and also, I should add, the Justice Department's enforcement powers—are sufficient to keep untoward activity of miscreants in check?

ON THE REGULATION OF U.S. CAPITAL MKTS. IN THE 21ST CENTURY, U.S. CHAMBER OF COMMERCE, REPORT AND RECOMMENDATIONS (2007), *available at* http://www.capitalmarketscommission.com/portal/capmarkets/default.htm; MICHAEL R. BLOOMBERG & CHARLES E. SCHUMER, SUSTAINING NEW YORK'S AND THE U.S.' GLOBAL FINANCIAL SERVICES LEADERSHIP (2007), *available at* http://www.schumer.senate.gov/SchumerWebsite/pressroom/special_reports/2007/NY_REPORT%20_FINAL.pdf.

126. U.S. CHAMBER OF COMMERCE, REPORT ON THE CURRENT ENFORCEMENT PROGRAM OF THE SECURITIES AND EXCHANGE COMMISSION (2006), *available* at http://www.uschamber.com/publications/reports/0603sec.htm.

127. U.S. SEC. & EXCH. COMM'N, 2006 PERFORMANCE AND ACCOUNTABILITY REPORT (2006), *available at* http://www.sec.gov/about/secpar/secpar2006.pdf.

128. GAO REPORT, *supra* note 117.

129. *See* Atkins, *Just Say No*, *supra* note 21.

130. Stoneridge Inv. Partners v. Scientific-Atlanta, Inc., 443 F.3d 987 (8th Cir. 2006), *cert. granted*, 127 S. Ct. 1873 (2007) (No. 06-43).

In fact, I do. This is a complicated question. I respect very much Jill's submission to the Supreme Court and the other side of the argument.[131]

From my perspective, there are lots of players in this. We have to remember that primary liability and, as the Solicitor General argued, a reliance, from an investor's perspective, are two very powerful and competing, but also contrasting sorts of elements of the case here. An investor can always sue, with respect to somebody who has primary liability, somebody who was intimately involved in the fraud, and can be shown to have had direct knowledge of and participation in that. An attorney, for example, who knew and saw his opinion being used to attract investors out there, who actually knew it was going to be used for that particular case, I think, arguably, could get caught up as a primary violator, even under current law. Of course, always, the facts play a big role in that. But it all comes down to knowledge and involvement.

But once you start stepping away from that, once you start getting into notions of aiding and abetting, and people that investors had no idea were even involved—people, for example, whether they are vendors or customers or others, who had dealings with the miscreant, with the person who actually deceived the investors—when you combine that with our notion these days of qualitative materiality, where even the last dollar of revenue that puts the miscreant over his bogey that he is trying to meet with respect to analysts on the Street and props up the stock, we have seen enforcement cases and others where we have gone after people for their involvement in those sorts of things.

So if you start expanding this notion in the private realm, beyond the government realm, I think you are opening up huge potential liability for people. You have to realize that in today's environment, where the urge to settle is much stronger than the willingness to fight to vindicate your rights and to vindicate your innocence—I think we are dealing with a very powerful and detrimental force for the U.S. capital markets that will have huge repercussions worldwide. This sort of liability could get people who are not necessarily even subject to U.S. securities laws, not even SEC registrants, and have them caught up in the web of liability under the securities laws.

131. *See* Brief for Professors James D. Cox et al. as Amici Curiae Supporting Petitioners, Stoneridge Inv. Partners LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 1701606.

That is a longwinded answer. It is a very complicated question. We will see how the Supreme Court rules on it.[132] But I think, from the reports I heard, the right questions were being asked today, and it sounded like, needless to say, an engaged bench.

QUESTION: Following up that question, then, considering Judge Lewis Kaplan's decision in *U.S. v. Stein*,[133] the so-called KPMG case, why do you think that a federal judge cannot sort out these distinctions, very sophisticated distinctions like this, that the SEC has also assigned on primary and secondary liability—why can a federal judge sort these out in a criminal case of the Department of Justice, and not in a private case with private litigants?

COMMISSIONER ATKINS: The question is, why cannot a federal judge sort out these secondary liability issues, if you look at the KPMG case and things like that, which are very complicated, similar types of questions before the judge?

That is a point, obviously. But it's not necessarily a question of whether the judge can sort it out. Ultimately, the facts will be what they are, and the finder of fact, whether it is a judge or a jury, more importantly, can look at it. But you have to realize how these cases get filed. They get filed, and there is discovery[134] and there is motion practice.[135] Most of them actually never even find their way to a courtroom to be sorted out. They are settled beforehand, with the plaintiff's attorneys taking their cut of the pot, even when it extends to billions of dollars, and investors getting paid what they will.

So it's the cost/benefit of having all of this sorted out in a private setting versus in a government setting. I would submit that if we follow the current law, the *Central Bank* decision[136] back in the mid-1990s—the Supreme Court there came to a balance of government action versus private action.[137] We have to remember that ultimately the private enforcement of 10b-5[138] and 10b[139] is a judicially crafted response,[140]

132. *See* Stoneridge Inv. Partners LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (finding for the defendants, holding that the implied private right of action under section 10(b) does not extend to aiders or abettors and that the defendants did not engage in deceptive conduct or commit misstatements on which the plaintiffs relied).

133. 495 F. Supp. 2d 390 (S.D.N.Y. 2007).

134. *See* FED R. CIV. P. 26.

135. *See* FED R. CIV. P. 7.

136. Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994).

137. *Id.* at 171-73.

138. 17 C.F.R. § 240.10b-5 (2007).

back in the 1940s, I guess, or whenever it was. It was not necessarily an intent of Congress.

QUESTION: With investors having increased opportunity to invest in global markets now—I know with E-Trade,[141] for instance, an investor is able to invest in foreign stock exchanges, not only in the United States—do you foresee any consolidation in terms of regulation of those investors or something along those lines? How would that work?

COMMISSIONER ATKINS: The question is, with respect to the growing ability of U.S. investors to invest directly abroad, will there be growing interaction among regulators to harmonize their regulations and work in common?

I think so. We are seeing that already. It is an amazing aspect of the current global financial markets that investors, because of the amazing increase in telecommunications and whatnot—the Internet—are able to invest directly abroad. We have seen how the private sector has responded to that challenge. You mentioned E-Trade. Some other broker-dealers are allowing investors, with a click of a mouse, to invest directly abroad.

That is an amazing change and one that I think regulators have to take into account, and one that, getting back to *Stoneridge* and some of these questions of liability and the costs that are imposed on people that do business here in this country, we have to take into account. If we look at these competitiveness reports[142] that have come out within the last year, I think they point out that litigation costs and other things that people are looking at here, which I have heard directly from folks abroad, are taking their toll on us.

If you look in 2006, that was the first year ever that the private institutional capital markets, the Rule 144A capital markets,[143] saw more

---

139. 15 U.S.C. § 78j(b) (2000).

140. *See*, *e.g.*, Ernst & Ernst v. Hochfelder, 425 U.S. 185, 196 ("Although [section] 10(b) does not by its terms create an express civil remedy for its violation, and there is no indication that Congress, or the Commission when adopting Rule 10b-5, contemplated such a remedy, the existence of a private cause of action for violations of the statute and the Rule is now well established.").

141. E-Trade Financial, Mutual Funds & ETFs, https://us.etrade.com/e/t/investingandtrading/mutualfundsandetfs?fundfamily=0&fund_fee_code=0 (last visited Feb. 7, 2008) (asserting E-Trade's claim to allow its customers access to every exchange-traded fund sold).

142. *See* sources cited s*upra* note 126.

143. 17 C.F.R. § 230.144A (2007).

capital raised in that market than in the public markets, which I think is pretty remarkable. Why is that? I think we need to look and see what is going on. We have to be introspective a little bit and take a look at our rules. These various reports have come out, and I am sure more are coming. We need to make sure that the costs and benefits that we have with respect to how we are regulating the securities markets are in balance.

QUESTION: To build up on that, litigation is one factor, but some would be critical that the SEC has not taken the leadership to try to address what regulatory changes might be necessary. There is an argument that our regulatory system is antiquated, where investors have access globally, and it's an inefficient way of doing business. Why hasn't the SEC been willing to take the lead in trying to deal with how we can more efficiently regulate cross-border transactions?

COMMISSIONER ATKINS: Great question. The question is, litigation is one factor, which I agree with, and there has been some criticism as to why the SEC is not being more active in looking at how our regulations—our regulations are antiquated—and how they could be updated to make them more effective in the modern world.

That is a big issue. We have had a lot on our plate over the last few years. I am not trying to make any excuses. I think we are taking steps to try to look to see how we can update our regulatory rulebook, as it were. The chairman himself has personally taken on XBRL,[144] which is a disclosure system using this extensible business reporting language. It is a way of tagging filings that are submitted by public companies so that investors can manipulate the information more easily to fit their uses.

For example, we have a proposal outstanding now to recognize international accounting reporting standards, IFRS,[145] so that there will no longer be a reconciliation requirement for foreign companies to come and issue their securities here in the United States. This is an old rule that dates way back to the 1970s or so. The U.S. at the time was the

144. *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Chairman Cox Announces Landmark Progress in Providing Instant, User-Friendly Access to Financial Reporting Information for Investors (Sept. 25, 2007), *available at* http://www.sec.gov/news/press/2007/2007-200.htm; *see also* XBRL International, Extensible Business Reporting Language, http://www.xbrl.org/Home/ (last visited Feb. 7, 2008).

145. *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Soliciting Public Comment on Eliminating Reconciliation Requirement for IFRS Financial Statements (July 3, 2007), *available at* http://www.sec.gov/news/press/2007/2007-128.htm.

biggest capital market in the world. You had a huge panoply of all sorts of GAAPs,[146] generally accepted accounting principles, across all sorts of different countries. The SEC threw up its hands and basically said, "If you want to issue securities here, please reconcile your home country's disclosure to ours."

Now, because of the onset of IFRS[147] and the European Community's mandating of IFRS across the whole European Union,[148] we have this proposal to do away with the reconciliation requirement and, in fact, recognize IFRS as on par with U.S. GAAP.[149]

That raises a corollary question. If we think that IFRS is okay for U.S. investors to understand it and to treat it side by side with U.S. GAAP, then why shouldn't an American company, if it has a lot of business abroad and if it has a lot of investors abroad, be able to report with IFRS? I think it's a great question. We have a concept release outstanding, and I encourage you all to read it and comment on it.[150]

So we are taking issue. We can do a lot more. We are talking now about mutual recognition. Whoever thought the SEC would be talking about such an issue of recognizing, actually, foreign regulatory regimes? But that is now being discussed.

I think some of the suggestions are not really realistic. They contemplate sort of a bottom-up approach of lining up the regulations here in the United States and comparing them to all the ones that—pick your foreign jurisdiction—seeing where they are the same and where

---

146. *See* Federal Accounting Standards Advisory Board, Generally Accepted Accounting Principles, http://www.fasab.gov/accepted.html (last visited Feb. 7, 2008).

147. International Financial Reporting Standards are accounting standards and interpretations promulgated by the International Accounting Standards Board, a non-profit organization committed to developing a single set of global accounting standards. International Accounting Standards Board, http://www.iasb.org/Home.htm (last visited Feb. 7, 2008).

148. *See* Press Release, Comm. of European Sec. Regulators, CESR Begins Work on Implementing Measures to Establish Equivalence Between Third Countries GAAP and IAS/IFRS and Launches a Call for Evidence (June 29, 2004), *available at* http://www.fsa.gov.uk/pubs/cesr/15-04.pdf.

149. Subsequent to this Lecture, the SEC adopted the rule allowing foreign private issuers to file financial statements prepared in accordance with IRFS without reconciliation to GAAP. Acceptance from Foreign Private Issuers of Financial Statements Prepared in Accordance with International Financial Reporting Standards without Reconciliation to U.S. GAAP, 73 Fed. Reg. 986 (Jan. 4, 2008) (to be codified at 17 C.F.R. pts. 210, 230, 239, and 249).

150. *Id.*

they differ, and then trying to harmonize them. Ultimately, once they get harmonized, then we can wave a wand and say, "Thou art mutually recognized."

That will never work, because, as you all know, things change, and by the time you go through one rulebook, say, of the FSA,[151] which is pretty thick—by the time you get to the end, you might as well start over, because things will have changed on our side or their side.

I think a better approach would be a top-down approach, like the Commodities Future Trading Commission has, or the Fed, where they look to see where there are common principles, whether we approach regulation in a similar way, and then how we can get comfortable that we are all on the same page. Then you look at individual firms. I think that is a much more realistic approach. That might be achieved in my lifetime, and maybe yours, too.

In the meantime, we shouldn't allow this academic type of discussion to deflect us from the real changes that need to be done, that are crying out to be done. For example, Rule 15a-6[152] is the one that governs how foreign broker-dealers can do business in the United States. It's very complicated. Basically, they have to call up and say, "U.S. broker-dealer, would you mind being my chaperone while I go to the dance with a U.S. investor?" This was actually a watershed when it was adopted by the Commission back in the 1980s. It's now an example of what you talk about as being very antiquated. That needs to be revised as soon as possible, at least with respect to institutional investors.

We have a lot of work to do.

QUESTION: In relation to 404[153] and 302[154] certifications, I know PCAOB[155] came out with guidance for public accounting firms, and then SEC came out with management guidance in terms of compliance

151. Financial Services Authority. For more information, please visit the FSA website, http://www.fsa.gov.uk/.

152. 17 C.F.R. § 240.15a-6 (2007).

153. 15 U.S.C. § 7262 (2006).

154. *Id.* § 7241.

155. *See* HAROLD S. BLOOMENTHAL, SARBANES-OXLEY ACT IN PERSPECTIVE 364-69 (2002) (describing the Public Company Accounting Oversight Board as a non-governmental, non-profit organization consisting of five members appointed by the SEC after consultation with the Chairman of the Federal Reserve Board and the Secretary of the Treasury). Its primary function is to "carry out the requirements of the [Sarbanes-Oxley Act] and to enforce compliance with the Act by registered public accounting firms and associated persons thereof, as required by Section 101(d) of the Act." *Id.*

audits. How does the dialogue go back and forth between PCAOB and SEC to make sure that when you do your recommendations, there is not an overkill?

COMMISSIONER ATKINS: I see. Good question. I will repeat that for you all. The question is, with respect to Sarbanes-Oxley 404[156] and the other certifications that need to be done, we have recently come out with revisions. PCAOB, the Public Company Accounting Oversight Board, had its Auditing Standard 2,[157] which we threw out, and we brought in Auditing Standard 5[158] to try to make it much more cost-effective, because—well, it's a long story. Auditing Standard 2,[159] we all know, was very costly and was overkill. It drove accountants, I think, to much more work than was contemplated or than is necessary.

The question is, how do we interact with the Accounting Oversight Board to make sure that things mesh?

That's a great question. I think, when you look at the process of 404[160] and our implementation of it, how that came about, it shows, really, a good working relationship between the SEC and the PCAOB. Of course, the PCAOB's constitutionality is being challenged and is being appealed now, after a decision in the district court.[161] It is being appealed up to the D.C. Circuit. In the brief that the government filed in

156. 15 U.S.C. § 7262.

157. *See* PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, RULES OF THE BOARD 152 (2007), *available at* http://www.pcaobus.org/Rules/Rules_of_the_Board/Auditing_Standard_2.pdf (stating that Auditing Standard 2 has been superseded by Standard No. 5 for audits of fiscal years ending on or after November 15, 2007) [hereinafter PCAOB 2].

158. *See* PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, RULES OF THE BOARD 396 (2007), *available at* http://www.pcaobus.org/Rules/Rules_of_the_Board/Auditing_Standard_5.pdf [hereinafter PCAOB 5].

159. *See* Press Release, SEC Approves PCAOB Auditing Standard No. 5 Regarding Audits of Internal Control Over Financial Reporting; Adopts Definition of "Significant Deficiency" (July 25, 2007), *available at* http://www.sec.gov/news/press/2007/2007-144.htm (calling Auditing Standard No. 2 "unduly expensive and inefficient"); *see also* JEFFERSON WELLS, PCAOB DISCUSSES CHANGING AUDITING STANDARD NO. 2 (2006), *available at* http://www.jeffersonwells.com/Knowledge/Internal/PCAOB_AS2_Change.pdf (discussing the merits of making revisions to the auditing standard).

160. 15 U.S.C. § 7262; *see* Press Release, U.S. Sec. & Exch. Comm., SEC Implements Internal Control Provisions of Sarbanes-Oxley Act; Adopts Investment Company R&D Safe Harbor (May 27, 2003), *available at* http://www.sec.gov/news/press/2003-66.htm.

161. *See* Free Enter. Fund v. PCAOB, No. 06-0217, 2007 WL 891675, at *1 (D.D.C. Mar. 21, 2007).

that case, basically it said that the SEC has plenary authority over PCAOB.[162] We appoint their members, we approve their budget, we approve their rules, and we hear appeals from any enforcement actions that they take.[163]

I take that very seriously. That's why at one point Commissioner Glassman[164] and I, a few years ago, demanded that we have a public meeting of the Commission to ask questions of the PCAOB with respect to their budget and have some sort of accountability as to where their budget stands. I feel strongly about that. You saw last year that we had that. I hope in the future that that continues.

So budgetary authority is one hook that we have. But, basically, we both are striving for the same sort of result. We both want to protect investors. We both want to ensure that there is a robust and effective auditing profession. Of course, that is the first line of defense that investors have against people who would lie, cheat, and steal. So we definitely need to concentrate on that.

When rules go awry, as Auditing Standard 2[165] did—we just heard and saw evidence of much more work—as I said, overwork—that was done and bills that were sky-high, and then the specter of having these sorts of practices then being applied to smaller companies, which could ill afford them. I can go into lots of stories about companies, little biotech companies, for example, that are public, but have no incoming revenue because they are waiting to have their drugs approved by the FDA. Basically, they are paying more to accountants and lawyers and consultants than they are paying to their CFO and all the people reporting to the CFO to put these financial reports together. That is an untenable situation from an investor's perspective.

So we took action, I think, very fast and very effectively, for the SEC to come out with management guidance, as you mentioned, giving something for companies to stand on so that they can wave that in front of their auditors, in case their auditors want to go overboard, and then

162. *See* Memorandum of Proposed Intervenor United States in Opposition to Plaintiffs' Motion for Summary Judgment and In Support of United States' Cross-Motion for Summary Judgment at 2-3, Free Enter. Fund v. PCAOB, No. 06-217, 2007 WL 891675 (D.D.C. 2006), *available at* http://www.sec.gov/news/extra/2006/2006-147_brief.pdf.

163. *Id.* at 4-5.

164. Cynthia A. Glassman—Biography, http://www.sec.gov/about/commissioner/glassman.htm (last visited Feb. 7, 2008).

165. PCAOB 2, *supra* note 157.

also revise Auditing Standard 2[166] and Auditing Standard 5,[167] to allow much more professional judgment, so that the auditors could exercise that, rather than feeling that they have to go to a prescriptive rulebook.

Hopefully, these steps that we have taken will yield fruit—and I mean to the bottom line, for the investor's benefit. If not, then we try, try again. We will have to readdress it. Congress, of course, is on our case, as they should be. There is a provision that the House put into our budget that would, in a sense, forbid us to spend any money enforcing 404[168] with respect to smaller companies. We will see how that proceeds through Congress. We hear people loud and clear, and I think we have taken good measures. I think it shows how we have a very cooperative relationship with the PCAOB.

QUESTION: We were told that one of the previous speakers was Elliott Spitzer. I am interested in what you think about the role in the regulation of U.S. securities markets of the attorney general of the state of New York?

COMMISSIONER ATKINS: The question is, my view of the appropriate role of the office of the attorney general in regulating the securities markets.

We have fifty attorneys general. One of them is armed with the Martin Act,[169] of course, which is very broad and gives broad powers, both civil and criminal.[170] I will leave it to the State of New York to sort that out as to whether or not they think that is effective with respect to the securities business, which, obviously, is a very important business to the state and city of New York.

I have to say that foreigners, in particular, are perplexed by our regulatory structure here in the United States. When you look at the insurance side, when you look at the securities side, we have fifty state regulators, and then we have the feds, with the SEC and CFTC and the Justice Department. I think we have our work cut out for us to try to make sense of this quilt that we have of regulatory overlap.

I think it has worked very well in the past, where we have had cooperation between states and federal officials. I have many friends—I am, in fact, the liaison from the SEC with respect to the state regulators,

---

166. *Id.*
167. PCAOB 5, *supra* note 158.
168. 15 U.S.C. § 7262 (2006).
169. N.Y. Gen. Bus. Law Art. 23-A (Consol. 2007).
170. *Id.*

the North American Securities Administrators Association.[171] I think there has been very good cooperation between the federal government, SEC, and the states on various matters. I would really hold that out as a model.

Regardless of what has happened in the past, I would encourage state officials to talk to us and work with us, and not do regulation or action through press release and other things. Due process is something that I, from my remarks, hold near and dear to my heart. I think it's incumbent on us, with the power of the government, whether it is federal or state, to respect due process and to respect our fellow regulators. If not, obviously we have Congress and others who can always step in to sort out questions of federalism as between preemption and other things. But right now I would hope that the system works well.

QUESTION: There has been talk in the past about combining the SEC and CFTC. I know in Britain that they do that.[172] I was just wondering what your thoughts are, if it would be more efficient, in your opinion, or what the result would be.

COMMISSIONER ATKINS: The question is, do I think we should combine the SEC and the CFTC, in view of what has gone on in other countries, in Britain, FSA and others. I might add, Korea is one,[173] and others.

I leave that to Congress, really, to decide. How about that for punting?

We get along, I think, very well with the CFTC. Their markets are much different than ours, for the most part. They have a very institutional market. Obviously, they have some retail component as well. But their rules and whatnot are dissimilar to ours. I am not saying that the two couldn't coexist. But I think, especially since the growth of the President's Working Group,[174] which sort of brings together, on an

171. North American Securities Administrators Association, Welcome to NASAA: The Voice of State and Provincial Securities Regulators, http://www.nasaa.org/About_NASAA (stating the mission of NASAA is to protect "consumers who purchase securities or investment advice").

172. *See Cole Lecture*, *supra* note 33.

173. *See* Financial Supervisory Commission, http://www.fsc.go.kr/eng/id/id0301.jsp (last visited Feb. 7, 2008).

174. *See* Nathaniel C. Nash, *Stock-Fall Study Gets Chairman*, N.Y. TIMES, Mar. 24, 1988, at 13 (defining the President's Working Group as the President's "interagency committee that seeks to produce a unified series of White House recommendations on how to avoid another stock market crash"). The committee consists of the Under Secretary of the Treasury for Finance and the chairmen of the Federal Reserve Board,

informal basis, the work of the financial regulators—I think that is a good solution for now. I leave it to Congress to decide.

PROF. FISCH: Thank you so much. I think we have caused you to overextend yourself, but let me offer to buy you a drink. For all of you out there as well, the bar is open.

the Securities and Exchange Commission and the Commodity Futures Trading Commission. *Id.*