NEWS

SECURITIES AND EXCHANGE COMMISSION
Washington, D. C. 20549
(202) 755-4848

REMARKS TO
AMERICAN STOCK EXCHANGE-WHARTON SCHOOL
CONFERENCE ON MID-RANGE COMPANIES
WASHINGTON, D.C.
JUNE 5, 1979

"CORPORATE GOVERNANCE ISSUES AND SMALL BUSINESS"

BY: ROBERTA S. KARMEL, COMMISSIONER*
SECURITIES AND EXCHANGE COMMISSION

SINCE I BECAME A COMMISSIONER OF THE SECURITIES AND EXCHANGE COMMISSION, THE SEC AND THE BUSINESS COMMUNITY HAVE BEEN ENGAGED IN TWO IMPORTANT DIALOGUES. ONE IS ON THE SUBJECT OF CORPORATE GOVERNANCE. THE OTHER IS ON THE SUBJECT OF SMALL BUSINESS. SIGNIFICANTLY, DURING MY FIRST YEAR IN OFFICE, THE COMMISSION CONDUCTED SEPARATE NATION-WIDE PUBLIC HEARINGS ON EACH OF THESE TOPICS.

SUCH DIALOGUES OFTEN ARE THE IMPETUS FOR CHANGE IN THE BUSINESS WORLD, NOT ONLY BECAUSE THEY MAY FORM THE BASIS FOR SEC RULEMAKING, BUT ALSO BECAUSE THEY MAY INITIATE VOLUNTARY ACTION BY THE BUSINESS COMMUNITY. THE RELATIONSHIP BETWEEN BUSINESS AND GOVERNMENT IN OUR COUNTRY IS BOTH ADVERSARIAL AND COOPERATIVE. MY PERSONAL VIEW IS THAT LESS HOSTILITY AND MORE COOPERATION BETWEEN BUSINESS AND GOVERNMENT IS NECESSARY FOR U.S. BUSINESS TO COMPETE EFFECTIVELY IN WORLD WIDE MARKETS.

IN THIS CONTEXT, I WILL SUGGEST THAT SOME OF THE DIALOGUE BETWEEN THE SEC AND THE BUSINESS COMMUNITY CONCERNING CORPORATE GOVERNANCE HAS NOT BEEN AS CONSTRUCTIVE AS IT MIGHT BE, PARTICULARLY WITH RESPECT TO THE APPLICABILITY OF CERTAIN CONCEPTS TO SMALLER PUBLIC COMPANIES.

I BELIEVE THIS IS BECAUSE PARTICIPANTS IN THE PUBLIC DISCUSSION ABOUT THESE MATTERS HAVE FOCUSED TOO MUCH ON QUANTITATIVE AND MECHANICAL QUESTIONS, SUCH AS DEFINITIONS AND NUMBERS OF INDEPENDENT DIRECTORS, NAMES AND NUMBERS OF COMMITTEES OF DIRECTORS, AND THE MECHANISMS FOR IMPOSING RESTRICTIONS ON BOARD STRUCTURE AND COMPOSITION. WE HAVE NOT DEVOTED ENOUGH TIME AND ATTENTION TO DISCUSSING THE OBJECTIVES OF OUR CORPORATE GOVERNANCE EFFORTS, AND THE BEST WAYS FOR EFFECTING QUALITATIVE IMPROVEMENTS ON CORPORATE BOARDS. FURTHER, WE HAVE NOT FOCUSED ON THE DIFFERENCES AMONG BUSINESS CORPORATIONS, NOR ON THE SPECIAL PROBLEMS OF SMALLER COMPANIES.

THE SEC'S PRESENT CHAIRMAN, HAROLD M. WILLIAMS, SET FORTH THE OBJECTIVES OF IMPROVEMENTS IN BOARD STRUCTURE, AS FOLLOWS:

> THE BOARD AND MANAGEMENT MUST BE SENSITIVE TO THE BURDEN ... TO DEMONSTRATE THAT THE EXERCISE OF CORPORATE POWER BOTH IS AND APPEARS TO BE ACCOUNTABLE TO SOME ORGAN WITH A BROADER PERSPECTIVE THAN EITHER SHAREHOLDERS OR MANAGEMENT ... BOTH MANAGEMENT AND DIRECTORS ALSO SHARE ANOTHER CLOSELY RELATED GOAL - - TO DEVELOP A BOARD WHICH CAN BRING THE BEST, MOST INFORMED, AND MOST OBJECTIVE ADVICE AVAILABLE TO BEAR IN SOLVING THE COMPLEX PROBLEMS WHICH CONFRONT THE ENTITY. 1/

1/ "CORPORATE ACCOUNTABILITY--ONE YEAR LATER," ADDRESS TO SIXTH ANNUAL SECURITIES REGULATION INSTITUTE, SAN DIEGO, CALIFORNIA, JANUARY 18, 1979, PP. 30-31.

THE SEC HAS NO DIRECT OR SPECIFIC MANDATE TO STRUCTURE OR ALTER THE STRUCTURE OF CORPORATE BOARDS. PERSONALLY, I HAVE NEVER SERVED AS A DIRECTOR OR OFFICER OF ANY PUBLIC CORPORATION, AND I AM NOT SANGUINE ABOUT MY ABILITY OR EXPERTISE AS A GOVERNMENT OFFICIAL TO GENERALLY REGULATE CORPORATE BEHAVIOR. NEVERTHELESS, THE SEC IS RESPONSIBLE FOR INCREASING CORPORATE ACCOUNTABILITY TO INVESTORS AND STOCKHOLDERS THROUGH COMPLIANCE WITH THE FEDERAL SECURITIES LAWS. AND AS RECENTLY POINTED OUT BY THE U.S. SUPREME COURT, THE SECURITIES LAWS DO NOT NARROWLY FOCUS ON INVESTOR PROTECTION TO THE EXCLUSION OF CERTAIN MACRO-ECONOMIC CONCERNS. 2/

IT SEEMS TO ME THAT THE PRIMARY OBJECTIVES OF THE SEC'S CORPORATE ACCOUNTABILITY PROGRAM SHOULD BE: (1) THE PREVENTION AND SUPPRESSION OF FRAUD BY PUBLIC ISSUERS UPON STOCKHOLDERS AND INVESTORS; (2) THE IMPROVEMENT OF SHAREHOLDER COMMUNICATIONS, GENERALLY AND PARTICULARLY IN THE CORPORATE ELECTORAL PROCESS; AND (3) THE ACHIEVEMENT OF SYSTEMS OF INTERNAL ACCOUNTING CONTROL. FURTHER, WE SHOULD KEEP IN MIND THAT THE PURPOSE OF THESE EFFORTS IS

2/ UNITED STATES V. NAFTALIN, SUP. CT. NO. 78-561 (MAY 21, 1979).

TO ENHANCE THE PERFORMANCE OF PUBLIC COMPANIES SO AS TO CREATE A CLIMATE OF INVESTOR CONFIDENCE HOSPITABLE TO CAPITAL FORMATION. WHILE THERE MAY BE OTHER VERY WORTHWHILE OBJECTIVES OF BOTH CORPORATE GOVERNANCE AND GOVERNMENT REGULATION, I DO NOT BELIEVE IT IS APPROPRIATE TO USE THE SECURITIES LAWS AS INSTRUMENTS TO ACHIEVE GENERAL ECONOMIC OR SOCIAL REFORM.

AN INCREASING NUMBER OF COMMENTATORS ARE CONCLUDING THAT GOVERNMENT REGULATION OF BUSINESS SHOULD PROCEED BY DISCLOSURE RATHER THAN STANDARD SETTING. THE SEC IS FORTUNATE IN THAT DISCLOSURE HAS BEEN THE PREDOMINANT REGULATORY MECHANISM GIVEN TO US BY CONGRESS. INDEED, THE COMMISSION'S PRESENT PROGRAMS FOR BOTH CORPORATE ACCOUNTABILITY AND SMALL BUSINESS ORIGINATE FROM THE 1977 REPORT OF THE ADVISORY COMMITTEE ON CORPORATE DISCLOSURE TO THE SEC.

THIS COMMITTEE RECOMMENDED THAT THE COMMISSION DEVELOP A PACKAGE OF DISCLOSURE REQUIREMENTS TO STRENGTHEN THE ABILITY OF BOARDS OF DIRECTORS TO OPERATE AS INDEPENDENT, EFFECTIVE MONITORS OF MANAGEMENT PERFORMANCE AND TO PROVIDE INVESTORS WITH A REASONABLE UNDERSTANDING OF THE ORGANIZATION AND ROLE OF THE BOARD. THE ADVISORY COMMITTEE ALSO SUGGESTED A RE-EVALUATION OF THE IMPACT OF SEC DISCLOSURE PROVISIONS ON THE GROWTH AND DEVELOPMENT OF SMALL BUSINESS.

In December 1978 the SEC adopted amendments to its proxy rules which require more comprehensive disclosures than previously about the composition and structure of boards of directors. These amendments require issuers to disclose certain business or personal relationships which a director or nominee has to a corporation or its management. They also require the corporation to disclose whether it has standing audit, nominating and compensation committees, and to identify the members of such committees. Certain new information about director attendance and resignations is also required.

Originally, the Commission had proposed rules which would have required greater disclosure about the functions of board committees. In rejecting such proposals, the Commission showed a sensitivity to the needs of smaller companies, and the commentators who felt that "a definition of functions customarily performed by audit, nominating and compensation committees would not allow for needed flexibility."

Another recent corporate accountability regulation of the Commission is the revised disclosure requirements about management remuneration adopted in December, 1978.

IN THIS AREA, THE COMMISSION HAS ALSO SHOWN A SENSITIVITY TO THE NEEDS OF SMALLER COMPANIES. THE FORM S-18, A SIMPLIFIED REGISTRATION FORM FOR SMALLER COMPANIES WAS ADOPTED BY THE COMMISSION IN APRIL OF THIS YEAR. AMONG OTHER THINGS, THE S-18 SIGNIFICANTLY RELAXES FOR USERS OF THE FORM THE MANAGEMENT REMUNERATION DISCLOSURE NOW OTHERWISE REQUIRED.

BEFORE PROCEEDING TO FURTHER POSSIBLE RULEMAKING RELATING TO CORPORATE GOVERNANCE, THE COMMISSION HAS DIRECTED THE STAFF TO ENGAGE IN TWO IMPORTANT PROJECTS. ONE IS A PROGRAM FOR MONITORING THE OPERATION AND EFFECTS OF THE COMMISSION'S NEW CORPORATE ACCOUNTABILITY RULES. THE OTHER IS THE PREPARATION OF A REPORT ON THE COMMISSION'S CORPORATE GOVERNANCE HEARINGS.

THE STAFF IS COLLECTING AND COLLATING DATA FROM PROXY STATEMENTS FILED THIS YEAR RESPECTING THE PREVALENCE OF THE DIRECTOR RELATIONSHIPS REQUIRED TO BE DISCLOSED UNDER THE SEC'S NEW RULES, THE EXISTENCE, COMPOSITION AND FUNCTIONS PERFORMED BY KEY STANDING COMMITTEES AND OTHER RELATED INFORMATION. THE STATISTICAL STUDY WILL INCLUDE ANALYSES FOR DIFFERENT CATEGORIES OF COMPANIES CLASSIFIED ACCORDING TO VARIOUS RELEVANT CRITERIA. THESE WILL INCLUDE TRADING MARKET CENTER AND SIZE OF ASSETS.

MUCH OF THIS INFORMATION IS NOT NOW READILY AVAILABLE. IT IS OBVIOUSLY RELEVANT TO AN EVALUATION OF THE OPERATION OF THE SEC'S NEW RULES AND OUR CONSIDERATION OF ANY FURTHER RULEMAKING INITIATIVES. FOR EXAMPLE, A CHICAGO-AREA STUDY IN MAY AND JUNE 1978 BY ARTHUR YOUNG & COMPANY SHOWED THAT THE SIZE OF OTC AND AMEX COMPANIES WITH AUDIT COMMITTEES VARIES WIDELY. THE SMALLEST, IN THAT STUDY, HAD SALES OR OPERATING INCOME IN 1976 OF $10 MILLION, WHILE THE LARGEST HAD SALES OF $908 MILLION. OUT OF 53 COMPANIES IN THE STUDY WHICH HAD SALES OR OPERATING INCOME OF $40 MILLION OR LESS, 19 HAD AUDIT COMMITTEES AND 34 DID NOT. OF THE 48 CHICAGO-AREA AMEX COMPANIES SURVEYED, 30 HAD AUDIT COMMITTEES AND 18 DID NOT.

THE COMMISSION HAS REPEATEDLY ENDORSED THE FORMATION OF AUDIT COMMITTEES AS A CORPORATE ACCOUNTABILITY MECHANISM. IN ORDER TO ACHIEVE FURTHER PROGRESS IN THIS REGARD, I THINK WE NEED THE KIND OF STATISTICAL INFORMATION SET FORTH IN THE ARTHUR YOUNG & COMPANY STUDY, PARTICULARLY FOR MID-RANGE COMPANIES, ON A MORE CURRENT AND A NATION-WIDE BASIS. FURTHER, WE NEED TO UNDERSTAND SOME OF THE REASONS WHY THOSE COMPANIES WHICH DO NOT HAVE AUDIT COMMITTEES HAVE CHOSEN NOT TO FORM THEM, AND IF COST IS AN IMPORTANT CONSIDERATION.

THE MONITORING PROGRAM WHICH THE STAFF IS CONDUCTING WILL GENERATE STATISTICAL INFORMATION ABOUT AUDIT AND OTHER COMMITTEE SYSTEMS, AS WELL AS DIRECTOR RELATIONSHIPS. I HOPE THAT THE COMMISSION WILL THEN BE ABLE TO PUBLISH THIS DATA, WHICH SHOULD CONTRIBUTE TO THE DIALOGUE BETWEEN THE COMMISSION AND THE BUSINESS COMMUNITY ON CORPORATE GOVERNANCE. RETURNING TO AN EARLIER STATEMENT, HOWEVER, I WOULD NOT WANT US TO BECOME BOGGED DOWN IN ARGUMENTS ABOUT STATISTICS AND MECHANICS. OUR OBJECTIVES ARE QUALITATIVE.

AUDIT COMMITTEES, FOR EXAMPLE, HAVE BECOME INCREASINGLY IMPORTANT BECAUSE OF THE ENACTMENT OF THE INTERNAL CONTROL PROVISIONS OF THE FOREIGN CORRUPT PRACTICES ACT OF 1977. HOWEVER, THE EXISTENCE OF AN AUDIT COMMITTEE DOES NOT INSURE ADEQUATE OR EFFECTIVE INTERNAL ACCOUNTING CONTROL OF AN ISSUER. AND I AM SURE THAT SOME COMPANIES WHICH DO NOT HAVE AN AUDIT COMMITTEE NEVERTHELESS HAVE AN ADEQUATE SYSTEM.

THE STAFF REPORT ON THE SEC'S CORPORATE GOVERNANCE HEARINGS WILL COVER A NUMBER OF TOPICS. I AM INFORMED BY THE STAFF THAT THE REPORT WILL DISCUSS THE DESIRABILITY OF BOARD COMMITTEE SYSTEMS, THE ROLE OF THE SELF-REGULATORY ORGANIZATIONS IN PROMOTING CORPORATE ACCOUNTABILITY, THE LIABILITY OF THE SHAREHOLDER PROPOSAL RULES AND SHAREHOLDER PARTICIPATION IN THE CORPORATE ELECTORAL PROCESS. FURTHER, THE STAFF INTENDS TO FOCUS ON THE ROLE OF INSTITUTIONAL INVESTORS.

THERE IS A DIFFICULT BALANCE THAT NEEDS TO BE STRUCK BETWEEN THE NEED TO PROMOTE CORPORATE ACCOUNTABILITY THROUGH SUCH MEANS AS SEC DISCLOSURE REQUIREMENTS, AND THE NEED TO ASSURE THAT APPLICABLE DISCLOSURE REQUIREMENTS ARE NOT UNNECESSARILY OR UNREASONABLY BURDENSOME SO AS TO IMPEDE CAPITAL FORMATION. IT SEEMS TO ME THAT THE COMMISSION IS MORE LIKELY TO STRIKE THE RIGHT BALANCE IF IT KEEPS IN MIND THE PLURALITY AND DIVERSITY OF AMERICAN BUSINESS.

BECAUSE I BELIEVE THAT THE DIFFERENCES BETWEEN BUSINESS ENTITIES IS ONE OF THE STRENGTHS OF OUR MIXED ECONOMY, LAST YEAR I OPPOSED THE LABELLING OF DIRECTORS BY WAY OF SEC DISCLOSURE REGULATIONS. INDEED, I AM SOMEONE WHO GENERALLY OPPOSES LABELLING AS NOT VERY INDICATIVE OF A PERSON'S VIEWS OR ABILITIES AND THEREFORE, I WAS SOMEWHAT BEMUSED WHEN THE CIRCULAR ADVERTISING THIS CONFERENCE BILLED ME AS THE COMMISSION'S MOST "CONSERVATIVE" MEMBER. I KNOW THAT THIS LABEL ORIGINATED IN A NEWSPAPER ARTICLE AND NOT THIS CONFERENCE'S PUBLICITY DEPARTMENT. HOWEVER, I BELIEVE THE LABEL IS MISLEADING AS APPLIED TO ME. I WOULD LIKE TO TAKE THIS OPPORTUNITY TO CORRECT THE RECORD, IF YOU WILL INDULGE ME BY USING THIS IDEA AS MY CONCLUSION. CALLING ME A "CONSERVATIVE" WOULD APPEAR TO PASS JUDGMENT ON MY OPINIONS BASED ON THE REACTIONS TO THEM OF THE BUSINESS COMMUNITY AND THE FEDERAL BUREAUCRACY RATHER THAN COMING TO TERMS WITH THE VERY VITAL ISSUE OF REGULATORY REFORM WHICH I CONSTANTLY STRESS.

THE APPROACH OF THE SEC TO REGULATION NEEDS AS MUCH CRITICAL SCRUTINY AND REFORM AS THE APPROACH OF THE CAB OR THE ICC. WE SHOULD APPROACH NEW IDEAS FOR FURTHER GOVERNMENT REGULATION, CONCERNING CORPORATE GOVERNANCE OR ANY OTHER SUBJECT, WITH MORE CAUTION THAN WE HAVE APPROACHED LAWMAKING IN THE PAST. AND SUCH REFORM SHOULD NOT BECOME A MONOPOLY OF "LIBERALS" OR "CONSERVATIVES." IT IS ESSENTIAL TO THE GENERAL WELFARE.

WHEN WE LOOK AT THE QUESTION OF HOW THE SEC'S CORPORATE GOVERNANCE INITIATIVES SHOULD BE APPLIED TO SMALLER PUBLIC COMPANIES, WE SEE SOME OF THE CONTRADICTORY POLICIES WHICH EFFECTIVE ECONOMIC REGULATION MUST RECONCILE. AS A LIFETIME "LIBERAL," I BELIEVE THAT THE VISION OF A BETTER SOCIETY FOR ALL AMERICANS, THROUGH GOVERNMENT INTERVENTION IN THE ECONOMY, WILL NOT BE ACHIEVED BY PUNITIVE STANDARD SETTING REGULATION WHICH FAILS TO ENCOURAGE MAXIMUM INNOVATION BY THE PRIVATE SECTOR.

NEWS

SECURITIES AND EXCHANGE COMMISSION
Washington, D. C. 20549
(202) 755-4846

ADDRESS TO
THE ANNUAL CONVENTION OF THE FLORIDA BAR
LAKE BUENA VISTA, FLORIDA
JUNE 15, 1979

"THE TROUBLE WITH IMPLIED REMEDIES AND SANCTIONS"

BY: ROBERTA S. KARMEL, COMMISSIONER
SECURITIES AND EXCHANGE COMMISSION

At the present time I am a regulator - a commissioner of an independent federal agency which exercises prosecutorial, rulemaking and adjudicatory powers. However, by profession I am a lawyer, and I am concerned about the law I participate in making and administering. I am keenly aware that in making decisions as a Commissioner I am, for the most part, basing my vote on my analysis of proper and applicable policy rather than my analysis of the law. But I feel very strongly that a component of proper policy is the orderly and coherent development of the securities law.

This afternoon I want to speak to you on a topic which has been of peculiar fascination to me since law school -- federal jurisdiction. In particular, I want to discuss two related issues which are both of immediate and long term concern to the Commission -- the implication of private rights of action in federal securities law cases, and the implication of sanctions in SEC administrative cases.

THE FEDERAL SECURITIES LAWS CONTAIN AN ELABORATE SCHEME OF REMEDIES FOR INVESTORS INJURED BY VIOLATIONS OF THE SECURITIES LAWS. IN ADDITION, NUMEROUS ENFORCEMENT SANCTIONS ARE PROVIDED TO THE SEC. THESE MECHANISMS FOR EFFECTING COMPLIANCE WITH THE LAW NEVERTHELESS PROVED INADEQUATE TO SATISFY THE DEMANDS OF THE CONSUMER PROTECTION MOVEMENT OF THE 1960'S AND EARLY 1970'S. A GREAT DEAL OF LITIGATION IN THE COURTS ENSUED IN WHICH RECOGNITION WAS GIVEN TO IMPLIED PRIVATE RIGHTS OF ACTION. IN ADDITION, THE COMMISSION TRIED TO SOLVE SOME OF ITS LAW ENFORCEMENT PROBLEMS BY FINDING IMPLIED AUTHORITY FOR NEW TYPES OF ADMINISTRATIVE PROCEEDINGS AND SANCTIONS.

THE PROBLEMS AND DANGERS OF THIS SEARCH FOR NEW OR MORE EFFECTIVE WAYS TO ENFORCE OBLIGATIONS CREATED BY THE FEDERAL SECURITIES LAWS HAVE BEGUN TO BE RECOGNIZED BY THE COURTS AND BY COMMENTATORS. MY PERSONAL VIEW IS THAT THE IMPLICATION OF BOTH PRIVATE RIGHTS OF ACTION AND GOVERNMENT SANCTIONS, IN THE ABSENCE OF A CLEAR CONGRESSIONAL DIRECTIVE, CONTRAVENES SOME BASIC LEGAL PRINCIPLES. MOREOVER, I DO NOT FEEL IT IS GOOD GOVERNMENT. THERE ARE OTHER POSSIBLE SOLUTIONS TO PRESENT INADEQUACIES IN THE DELINEATION OF ENFORCEMENT MECHANISMS IN THE SECURITIES LAWS.

BEFORE DISCUSSING THESE MATTERS IN FURTHER DETAIL, I WILL BRIEFLY DESCRIBE CURRENT LEGAL TRENDS APPLICABLE TO THE LAW OF IMPLIED CLAIMS AND PROCEDURES. THE FEDERAL SECURITIES LAWS HAVE PROVEN THE MOST FRUITFUL SOURCE OF IMPLIED PRIVATE REMEDIES UNDER ALL OF FEDERAL STATUTORY LAW. IMPLIED RIGHTS OF ACTION UNDER THE FEDERAL SECURITIES LAWS HAVE BEEN RECOGNIZED AT LEAST SINCE 1946 WHEN MORRIS KARDON SUED THE NATIONAL GYPSUM COMPANY. 1/ THAT ACTION WAS BROUGHT UNDER SECTION 10(B) OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 10B-5. THESE GENERAL ANTI-FRAUD PROVISIONS, NOTWITHSTANDING EXPRESS STATUTORY CIVIL REMEDIES, 2/ BECAME THE MOST WIDELY USED VEHICLES UNDER THE SECURITIES LAWS FOR PRIVATE PLAINTIFFS.

FOR THIRTY YEARS IMPLIED ACTIONS EXPANDED IN SCOPE AND NUMBER AS A RESULT OF BROAD JUDICIAL INTERPRETATIONS OF THE SECURITIES LAWS. THIS EXPANSIVE DEVELOPMENT SUBSTANTIALLY INCREASED THE CLASS OF PRIVATE PLAINTIFFS

1/ KARDON V. NATIONAL GYPSUM CO., 69 F. SUPP. 512 (E.D. PA. 1946).

2/ CIVIL REMEDIES ARE EXPRESSLY PROVIDED, FOR EXAMPLE, IN SECTIONS 11, 12, AND 15 OF THE SECURITIES ACT OF 1933, 15 U.S.C. SECTIONS 77K, 77L, 77O, AND IN SECTIONS 9, 16, 18, AND 20 OF THE SECURITIES EXCHANGE ACT OF 1934, 15 U.S.C. SECTIONS 78I, 78P, 78R, 78T.

ENTITLED TO RECOVER IN SECURITIES-RELATED TRANSACTIONS AND INCREASED THE CLASS OF DEFENDANTS EXPOSED TO LIABILITY. ALSO, LIMITS ON THE EXTENT OF LIABILITY BECAME UNCERTAIN AS THE FORMULATION OF DAMAGES AWARDED BECAME MORE COMPLEX.

IT WAS NOT, HOWEVER, UNTIL 1964 THAT THE SUPREME COURT HELD THAT AN IMPLIED PRIVATE RIGHT OF ACTION EXISTED UNDER THE FEDERAL SECURITIES LAWS BY RECOGNIZING AN IMPLIED ACTION UNDER SECTION 14(A) OF THE EXCHANGE ACT FOR A FALSE AND MISLEADING PROXY STATEMENT. 3/ THE SUPREME COURT RATIONALIZED THAT SINCE SECTION 14(A) WAS PRINCIPALLY INTENDED TO PROTECT INVESTORS, THE AVAILABILITY OF JUDICIAL RELIEF SHOULD BE IMPLIED TO ACHIEVE THAT RESULT. PRIVATE ENFORCEMENT OF THE PROXY RULES, THE COURT REASONED, WAS NECESSARY TO SUPPLEMENT THE ACTIVITIES OF THE SEC AND TO FURTHER THE CONGRESSIONAL PURPOSE OF PROTECTING INVESTORS FROM FRAUDULENT PROXY MATERIAL. IT WAS NOT UNTIL 1971 THAT THE SUPREME COURT CONFIRMED, WITH VIRTUALLY NO DISCUSSION, THAT A PRIVATE RIGHT OF ACTION EXISTED UNDER SECTION 10(B) AND RULE 10B-5. 4/

FROM 1946 UNTIL 1975 THE SUPREME COURT ACCEPTED FEW SECURITIES CASES. TO THE EXTENT THAT IT COMMENTED UPON THE EXPANSION OF DEFENDANTS' LIABILITY AND THE ENHANCEMENT

3/ J.I. CASE CO. V. BORAK, 377 U.S. 426 (1964).

4/ SUPERINTENDENT OF INS. V. BANKERS LIFE & CASUALTY CO., 404 U.S. 6, 13 N. 9 (1971).

OF PRIVATE REMEDIES IN THE LOWER COURTS, THE COURT MERELY CONFIRMED DEVELOPMENTS THAT AFFORDED THE PRIVATE PLAINTIFF CONSIDERABLE LATITUDE UNDER THE SECURITIES LAWS--ESPECIALLY UNDER RULE 10B-5. THE LOWER COURTS, FOLLOWING THIS LEAD, PROGRESSIVELY INCREASED THE NUMBER AND SCOPE OF IMPLIED RIGHTS AND REMEDIES.

THIS RAPID AND UNCHECKED GROWTH OF SECURITIES LAW CASES SPAWNED NUMEROUS PROBLEMS. A LARGE CATEGORY OF DEFENDANTS BECAME EXPOSED TO LIABILITY FROM A LARGE CATEGORY OF PLAINTIFFS WITHOUT ANY CLEAR LIMITATIONS. UNLIKE AN ACTION BASED ON AN EXPRESS REMEDY, WHEN AN ACTION IS IMPLIED OR CREATED THERE IS NO CERTAINTY AS TO WHAT THE ELEMENTS OF OR DEFENSES TO THAT ACTION ARE. THE SAME IS TRUE CONCERNING THE MEASUREMENT OF DAMAGES OR THE APPLICABLE STATUTE OF LIMITATIONS. BECAUSE THE EXPRESS STATUTORY REMEDIES HAVE GENERALLY BEEN IGNORED IN FORMULATING THESE NEW ACTIONS, THE COURTS HAVE BEEN FREE TO SAY WHAT REQUIREMENTS ATTACH FOR THE IMPLIED ACTIONS THEY FIND TO EXIST.

ALL THIS HAS CREATED UNCERTAINTY AS TO EXACTLY WHAT IS THE LAW OR THE EXTENT OF LIABILITY FOR ITS VIOLATION. THIS MEANS THAT BOTH PLAINTIFFS AND DEFENDANTS HAVE HAD TO ASCERTAIN THE EXTENT OF RECOVERY FOR AN INJURED INVESTOR THROUGH EXPENSIVE AND TIME-CONSUMING LITIGATION. PARTICULARLY DISTURBING TO COMMENTATORS HAS BEEN THE UNLIMITED NATURE OF LIABILITY IN CASES FOUNDED ON IMPLIED ANTIFRAUD ACTIONS. ASTRONOMICAL DAMAGES HAVE BEEN CLAIMED,

AND SOMETIMES AWARDED, BEYOND ANY DAMAGES MEASUREMENT CONTEMPLATED BY CONGRESS WHEN THE SECURITIES ACTS WERE PASSED.

I RECOGNIZE THAT AS BUSINESS PRACTICES OR TECHNOLOGY CHANGE, COURTS MUST CONSTRUE REMEDIAL LEGISLATION LIKE THE SECURITIES LAWS SO THAT THEY SENSIBLY GOVERN SPECIFIC CASES. THIS IS A NECESSARY AND VALUABLE FUNCTION OF THE JUDICIARY AND OFTEN AVOIDS INJUSTICE IN A PARTICULAR MATTER. BUT IT IS INCUMBENT UPON CONGRESS TO REVIEW AND ADAPT ITS LEGISLATIVE DIRECTIVES, IN ORDER TO AVOID LEAVING WHAT ARE, IN EFFECT, LEGISLATIVE TASKS TO THE COURTS BY DEFAULT.

THESE PROBLEMS HAVE BEEN OBSERVED BY THE PRESENT SUPREME COURT, WHICH HAS TAKEN A CRITICAL LOOK AT OVERCROWDED FEDERAL COURT DOCKETS, THE INVOLVEMENT OF THE COURTS IN BASICALLY NON-JUDICIAL MATTERS, AND ACCESS TO THE FEDERAL COURTS GENERALLY. PARTICULAR FOCUS HAS BEEN PLACED ON THE EXPANSION OF IMPLIED PRIVATE ACTIONS.

BEGINNING IN 1975, THE BURGER COURT BEGAN WHAT IS GENERALLY REGARDED AS A RETRENCHMENT. IT BEGAN TO RE-EXAMINE IMPLIED CLAIMS, AND ESPECIALLY THOSE FOUND TO EXIST UNDER THE SECURITIES LAWS. THE COURT EXPRESSED CONCERN ABOUT THE UNLIMITED AND UNCERTAIN NATURE OF IMPLIED REMEDIES AND ABOUT TRYING TO READ LEGISLATIVE INTENT FROM VAGUE OR SILENT STATUTES. THEREFORE, THE COURT HAS CIRCUMSCRIBED IMPLIED ACTIONS IN A SERIES OF CASES. IN THESE CASES THE COURT HAS

REFUSED TO INFER IMPLIED ACTIONS AND HAS SET STRINGENT REQUIREMENTS FOR FINDING AN IMPLIED PRIVATE REMEDY. 5/

IN A SIGNIFICANT RECENT DECISION, CANNON V. UNIVERSITY OF CHICAGO, 6/ THE SUPREME COURT AGAIN SPOKE ABOUT ITS CLEAR RELUCTANCE TO FIND IMPLIED PRIVATE ACTIONS WHEN LEGISLATIVE INTENT IS UNCLEAR. ALTHOUGH AN IMPLIED ACTION UNDER TITLE IX OF THE CIVIL RIGHTS ACT BASED ON SEX DISCRIMINATION WAS FOUND TO EXIST, THE COURT VIEWED SUCH IMPLICATION AS A SPECIAL SITUATION. THE ENTIRE COURT, ALBEIT DIVIDED ON THE RESULT, THOUGHT THAT CONGRESS SHOULD CLEARLY STATE ITS INTENT AND PROVIDE AN EXPRESS REMEDY IF THAT IS WHAT IT WANTS. THE MAJORITY, CONCURRING, AND DISSENTING OPINIONS IN CANNON ALL APPEAR TO GIVE A DIRECT MESSAGE TO THE LOWER COURTS THAT YESTERDAY'S EXPANSION OF IMPLIED PRIVATE REMEDIES IS OVER.

AS NOTED EARLIER, FORMULATION OF NEW REMEDIES UNDER THE SECURITIES LAWS HAS NOT BEEN LIMITED TO JUDICIAL FINDINGS OF IMPLIED PRIVATE ACTIONS. RECENTLY, THE SEC HAS ALSO BEEN ENGAGED IN FORMULATING PROSECUTORIAL REMEDIES BASED ON IMPLIED ADMINISTRATIVE AUTHORITY. THIS ADMINISTRATIVE IMPLICATION, LIKE THE CREATION OF IMPLIED PRIVATE RIGHTS, HAS BEEN A RESPONSE TO THE PERCEIVED INADEQUACIES OF EXISTING EXPRESS REMEDIES.

5/ SEE E.G., PIPER V. CHRIS-CRAFT INDUSTRIES, INC., 430 U.S. 1 (1977); CORT V. ASH, 422 U.S. 66 (1975). BLUE CHIP STAMPS V. MANOR DRUG STORES, 421 U.S. 723 (1975).

6/ 47 U.S.L.W. 4549 (MAY 14, 1979).

THE SEC HAS A VARIED ARSENAL OF ENFORCEMENT WEAPONS. IT CAN BRING CIVIL INJUNCTIVE ACTIONS AGAINST ANY PERSON FOR VIOLATING THE SECURITIES LAWS. IT CAN ALSO REFER A MATTER TO THE JUSTICE DEPARTMENT FOR CRIMINAL PROSECUTION. THE COMMISSION CAN TAKE ADMINISTRATIVE ACTION TO BAR OR SUSPEND SECURITIES PROFESSIONALS FROM THE SECURITIES INDUSTRY. IT CAN COMPEL PUBLIC COMPANIES REGISTERED WITH THE COMMISSION TO CORRECT FILINGS. THIS IS THE EXTENT OF THE SEC'S EXPRESS STATUTORY REMEDIES. IT HAS NO CEASE AND DESIST POWER.

SINCE THE MID 1960'S THE SECURITIES LAWS HAVE BEEN SUBSTANTIALLY AMENDED TO INCREASE THE COMMISSION'S REGULATORY RESPONSIBILITIES. FURTHER, AS THE COURTS EXPANSIVELY INTERPRETED THE SECURITIES LAWS, THE SEC SAW FIT TO AGGRESSIVELY ENFORCE THE VARIOUS BROADLY-READ PROVISIONS. HOWEVER, THE COURTS OF TODAY HAVE BEEN LESS HOSPITABLE THAN THE COURTS OF YESTERDAY. THE SUPREME COURT'S QUESTIONING OF ACCESS TO THE FEDERAL COURTS HAS LED TO GREATER SCRUTINY OF ALL ACTIONS BEFORE THE FEDERAL BENCH, INCLUDING THOSE INITIATED BY THE SEC.

FACED WITH A DIFFICULT ENFORCEMENT PROBLEM, THE SEC HAS REACTED BY CONSTRUING ITS EXPRESS ADMINISTRATIVE JURISDICTION BROADLY AND BY FORMULATING NEW ADMINISTRATIVE REMEDIES BASED ON IMPLIED AUTHORITY.

A HIGHLY CONTROVERSIAL EXAMPLE OF THE USE OF IMPLIED SANCTIONS BY THE COMMISSION IS RULE 2(E) OF THE COMMISSION'S RULES OF PRACTICE, WHICH IS UTILIZED TO BRING DISCIPLINARY PROCEEDINGS AGAINST ATTORNEYS AND ACCOUNTANTS. I BEGAN TAKING ISSUE WITH THE USE OF RULE 2(E) TO REGULATE PROFESSIONAL CONDUCT BEFORE I BECAME A COMMISSIONER. AND I HAVE CONTINUING PROBLEMS WITH THE USE OF A LIMITED IMPLIED POWER TO PROSECUTE AND SET STANDARDS FOR ACCOUNTANTS AND ATTORNEYS.

I HAVE DISSENTED FROM THE COMMISSION'S USE OF SECTION 21(A) OF THE EXCHANGE ACT TO PUBLICIZE THE FACTS AND STATUS OF AN ENFORCEMENT INVESTIGATION. Z/ IN MY MIND, PUBLICITY BASED ON SECTION 21(A) IS BEING USED AS A SANCTION AND THUS AS AN ALTERNATIVE ENFORCEMENT TOOL IN DEROGATION OF EXPRESS STATUTORY REMEDIES. ANOTHER IMPLIED SANCTION WHICH I HAVE CRITICIZED IS THE USE OF SECTION 15(C)(4)

Z/ IN THE MATTER OF THE COMMISSION'S PRACTICE RELATING TO REPORTS OF INVESTIGATION AND STATEMENTS SUBMITTED TO THE COMMISSION PURSUANT TO SECTION 21(A) OF THE SECURITIES EXCHANGE ACT OF 1934, SECURITIES EXCHANGE ACT RELEASE NO. 15664 (MARCH 21, 1979).

OF THE EXCHANGE ACT TO ADMINISTRATIVELY SANCTION PERSONS FOR MISCONDUCT ENTIRELY DIFFERENT FROM WHAT I BELIEVE THE SECTION WAS INTENDED TO COVER. 8/

THERE IS ONE CASE DECIDED BY THE BURGER COURT INVOLVING IMPLIED PROSECUTORIAL REMEDIES WHICH REFLECTS A RETRENCHMENT SIMILAR TO THE COURT'S RESPONSE TO IMPLIED PRIVATE RIGHTS. IN SEC V. SLOAN 9/ THE COURT OVERTURNED A LONG STANDING PRACTICE OF THE COMMISSION TO SUMMARILY SUSPEND FOR CONSECUTIVE PERIODS THE TRADING IN A PARTICULAR SECURITY. THE COURT SAID THAT THE COMMISSION SIMPLY DID NOT HAVE THAT AUTHORITY AND THAT NO IMPLICATION OF SUCH AN ADMINISTRATIVE REMEDY WAS INTENDED BY CONGRESS. ALTHOUGH THE SECOND CIRCUIT RECENTLY UPHELD THE COMMISSION'S IMPLIED AUTHORITY TO DISCIPLINE ACCOUNTANTS, 10/ IT REMAINS TO BE SEEN WHETHER THIS PRECEDENT WILL BE RECONCILABLE WITH THE SLOAN AND CANNON CASES.

8/ IN THE MATTER OF SPARTEK, INC., SECURITIES EXCHANGE ACT RELEASE NO. 15567 (FEB. 14, 1979).

9/ 436 U.S. 103 (1978).

10/ TOUCHE ROSS & CO. V. SEC. /CURRENT/ CCH FED. SEC. L. REP. PAR. 96,854 (2D CIR. MAY 10, 1979).

THERE ARE A NUMBER OF BASIC LEGAL PROBLEMS WITH THE JUDICIAL OR ADMINISTRATIVE IMPLICATION OF REMEDIES AND SANCTIONS. IT VIOLATES THE NOTION OF LIMITED FEDERAL JURISDICTION. IN THE CASE OF PRIVATE LITIGATION, THE SUPREME COURT HAS HELD THAT THERE IS NO FEDERAL CORPORATION LAW. 11/ BUT THE GROWTH OF THE SUBSTANTIVE LAW THROUGH IMPLIED ACTIONS CREATES SUCH A BODY OF FEDERAL COMMON LAW. SIMILARLY, AN INDEPENDENT FEDERAL AGENCY HAS ONLY THOSE POWERS EXPRESSLY GRANTED TO IT BY CONGRESS. BUT THE CREATION OF NEW REMEDIES BY IMPLICATION ADDS TO SUCH POWERS.

IN HIS DISSENTING OPINION IN CANNON V. UNIVERSITY OF CHICAGO, MR. JUSTICE POWELL ARGUED FORCEFULLY AGAINST THE JUDICIAL IMPLICATION OF PRIVATE RIGHTS OF ACTION UNDER FEDERAL LEGISLATION. HIS RATIONALE WAS THAT SUCH IMPLICATION VIOLATES THE DOCTRINE OF SEPARATION OF POWERS.

> RATHER THAN CONFRONTING THE HARD POLITICAL CHORES INVOLVED, CONGRESS IS ENCOURAGED TO SHIRK ITS CONSTITUTIONAL OBLIGATION AND LEAVE THE ISSUE TO THE COURTS TO DECIDE. WHEN THIS HAPPENS, THE LEGISLATIVE PROCESS WITH ITS PUBLIC SCRUTINY AND PARTICIPATION HAS BEEN BYPASSED, WITH ATTENDANT PREJUDICE TO EVERYONE CONCERNED. 12/

THE ADMINISTRATIVE IMPLICATION OF PROSECUTORIAL REMEDIES UNDER FEDERAL LEGISLATION IS RIFE WITH THE SAME EVIL.

11/ SANTA FE INDUSTRIES, INC. V. GREEN, 436 U.S. 462 (1977).

12/ CANNON V. UNIVERSITY OF CHICAGO, NOTE 6 SUPRA, AT 14 (DISSENT A).

THERE IS A SIMILAR DANGER OF ARROGATION BY AN ADMINISTRATIVE BODY OF THE RIGHT TO RESOLVE GENERAL SOCIETAL CONFLICTS WHEN THE PUBLIC IS DENIED THE BENEFITS DERIVED FROM THE MAKING OF IMPORTANT CHOICES THROUGH THE OPEN DEBATE OF THE DEMOCRATIC PROCESS. THE DANGER OF INAPPROPRIATE REGULATION THROUGH PROSECUTORIAL POWER IS AS REAL AS OVER-REGULATION THROUGH RULEMAKING, AND THE SAFEGUARDS OF RULEMAKING PROCEEDINGS ARE IGNORED. THE POTENTIAL FOR ABUSE IS GREAT WHEN A GOVERNMENT PROSECUTOR IS NOT HELD TO THE LIMITATIONS AND STANDARDS OF A SPECIFIED STATUTORY REMEDY.

LAW ENFORCEMENT OFFICIALS GENERALLY LIKE BROAD STATUTORY LANGUAGE WHICH GIVES THEM MAXIMUM FLEXIBILITY TO PROSECUTE SUSPECTED VIOLATORS. SOME THEORIZE THAT UNCERTAINTY ABOUT THE PARAMETERS OF THE LAW OR PROSECUTORIAL POLICIES HELPS ENFORCE THE LAW. I DO NOT AGREE WITH THIS ATTITUDE.

I BELIEVE THAT CLARITY AND PREDICTABILITY ESPECIALLY IN A REGULATORY SCHEME AS COMPLEX AS THE SECURITIES LAWS, IS AN IMPORTANT INGREDIENT OF RESPECT FOR THE LAW. IT IS IMPORTANT FOR THE SEC AND THE COURTS, AS WELL AS THE CONGRESS, TO STATE CLEARLY WHAT THE LAW IS AND WHY CONDUCT AGAINST WHICH ACTION IS TAKEN IS PROSCRIBED. ADHERENCE TO THE LAW IS ENCOURAGED BY THE CLARITY OF STANDARDS WHICH ARE RIGOROUSLY ENFORCED.

CONVERSELY, FUZZINESS IN EITHER THE SUBSTANTIVE OR PROCEDURAL ASPECTS OF A FEDERAL STATUTE BREEDS CYNICISM ABOUT LEGAL REQUIREMENTS. IF A STATUTE CAN BE READ TO MEAN ANYTHING, THEN IT MEANS NOTHING. IF THE LAW CANNOT BE ADEQUATELY UNDERSTOOD ON ITS FACE, IT SERVES NO GUIDANCE AND EXISTS ONLY TO IMPOSE LIABILITY.

TO EXPRESS MY DOUBTS ABOUT IMPLIED REMEDIES AND SANCTIONS, IS NOT TO SUGGEST THAT EITHER INJURED INVESTORS OR THE COMMISSION SHOULD BE LEFT POWERLESS TO ENFORCE THE SECURITIES LAWS. IF EXPRESS ENFORCEMENT MECHANISMS ARE IN FACT INADEQUATE, I BELIEVE THE PROPER COURSE OF ACTION IS TO ASK CONGRESS FOR MORE AUTHORITY. IN SPITE OF TODAY'S ANTI-REGULATORY ATMOSPHERE, I BELIEVE THIS IS THE FAR BETTER ALTERNATIVE THAN TWISTING THE CURRENT STATUTES TO THE POINT OF LOSING RESPECT FOR THE LAWS AND FOR THE AGENCY WHICH ADMINISTERS THEM. THE RISKS INVOLVED ARE SIMPLY NOT WORTH THE CONSEQUENCES.

CURRENTLY THERE IS PROPOSED LEGISLATION WHICH, AMONG OTHER THINGS, ADDRESSES SOME OF MY CONCERNS. SCHEDULED TO BE INTRODUCED IN CONGRESS LATER THIS YEAR IS THE AMERICAN LAW INSTITUTE'S PROPOSED FEDERAL SECURITIES CODE. THE CODE IS A TEN YEAR PRODUCT OF LEGAL SCHOLARSHIP BY PROFESSOR

LOUIS LOSS OF HARVARD AND OTHERS. IT IS THE MOST COMPREHENSIVE REVIEW AND ANALYSIS OF THE FEDERAL SECURITIES LAWS SINCE THEIR ENACTMENT OVER 40 YEARS AGO. IT IS A COMPLICATED DOCUMENT (REFLECTING THE COMPLEXITY OF THE PRESENT LAW) WHICH GENERALLY CODIFIES BUT ALSO MAKES SUBSTANTIVE CHANGES TO THE CURRENT SECURITIES LAWS. THE CODE ATTEMPTS TO SET FORTH WHAT THE LAW IS SO AS TO AFFORD GUIDANCE AND PREDICTABILITY WHILE AT THE SAME TIME RESERVING SOME FLEXIBILITY FOR THE SEC. THE COMMISSION IS CURRENTLY REVIEWING THE CODE TO DETERMINE WHETHER ITS ADOPTION WOULD BE IN THE PUBLIC INTEREST. THEREFORE I AM NOT NOW IN A POSITION TO RECOMMEND FOR OR AGAINST ITS ADOPTION, AND I WOULD NOT WANT THESE REMARKS TO BE CONSTRUED AS A POSITION REGARDING THE CODE'S ADOPTION.

I WANT TO POINT OUT, HOWEVER, THAT IF THE CODE BECAME LAW IT WOULD PROVIDE MUCH NEEDED CLARITY AND SPECIFICITY WITH RESPECT TO BOTH SEC AND PRIVATE REMEDIES. FOR EXAMPLE, ALL CURRENT EXPRESS PRIVATE ACTIONS ARE PRESERVED AND SPELLED OUT. 13/ IN ADDITION, THE CODE SPECIFICALLY CODIFIES ALL GENERALLY RECOGNIZED IMPLIED PRIVATE ACTIONS UNDER THE CURRENT STATUTES. 14/ IN MAKING EXPRESS ACTIONS WHICH TODAY ARE IMPLIED, THE CODE ALSO PROVIDES CERTAINTY AS TO WHAT THE VARIOUS REQUIREMENTS FOR THOSE ACTIONS ARE.

13/ E.G. ALI FEDERAL SECURITIES CODE (PROPOSED OFFICIAL DRAFT MARCH 15, 1978) (HEREINAFTER CITED AS "ALI CODE") SECTIONS 1704-05, 1714.

14/ E.G. ALI CODE SECTIONS 1702, 1703, 1709, 1713, 1715, 1716, 1717, 1720 AND 1721.

NEW IMPLIED PRIVATE ACTIONS CAN ONLY BE CREATED BY SATISFACTION OF DETAILED REQUIREMENTS. 15/ MOREOVER, THE TYPES OF RELIEF AVAILABLE TO PRIVATE PLAINTIFFS ARE SET FORTH, INCLUDING PARTICULAR FORMULATIONS AS TO MEASUREMENT OF DAMAGES. 16/

THE CODE, FOR THE MOST PART, MAINTAINS THE SEC'S EXPRESS CIVIL REMEDIES. 17/ ALTHOUGH IT DOES NOT CONTAIN A CEASE AND DESIST POWER, IT DOES ESTABLISH A FIRM STATUTORY BASIS FOR VARIOUS FORMS OF ANCILLARY RELIEF WHICH CAN BE GRANTED BY A COURT. 18/

AS FOR THE COMMISSION'S ADMINISTRATIVE AUTHORITY, THE CODE HAS CONSOLIDATED PRESENT EXPRESS REMEDIES TO A SIGNIFICANT DEGREE AND MAKES VERY EXPLICIT THE PARTICULAR PROCEEDINGS TO BE FOLLOWED AND THE SANCTIONS THAT CAN BE IMPOSED. 19/ GENERALLY, THE SEC'S ADMINISTRATIVE REMEDIES ARE EXPANDED FROM EXISTING PROVISIONS, ALTHOUGH NO ENTIRELY NEW ADMINISTRATIVE REMEDY IS CREATED. 20/ THE COMMISSION WOULD HAVE

15/ ALI CODE SECTION 1722.

16/ E.G., ALI CODE SECTION 1708.

17/ SEE, ALI CODE SECTION 1819.

18/ ALI CODE SECTION 1819(L).

19/ E.G., ALI CODE SECTIONS 1809 AND 1817.

20/ BUT SEE ALI CODE SECTION 1808(A) REGARDING ADMINISTRATIVE AUTHORITY OVER REGISTRANTS (COMPANIES REGISTERED WITH THE COMMISSION).

FOR EXAMPLE, EXPANDED ADMINISTRATIVE AUTHORITY OVER COMPANIES WHICH FILE VARIOUS REPORTING DOCUMENTS WITH THE AGENCY. 21/ ITS POWERS REGARDING THE SUSPENSION OF STOCK TRADING WOULD BE INCREASED IN SUCH A FASHION AS TO REMEDY THE LACK OF AUTHORITY THE SUPREME COURT FOUND TO EXIST IN THE SLOAN CASE. 22/ UNDER THE CODE, THE COMMISSION WOULD ALSO HAVE A SIGNIFICANT NEW ARSENAL OF SANCTIONS AVAILABLE WITH WHICH TO DISCIPLINE REGISTRANTS AND ASSOCIATED PERSONS. 23/

THE REQUIREMENTS AND LIMITATIONS OF BOTH THE COMMISSION'S SUBSTANTIVE AND PROCEDURAL ADMINISTRATIVE AUTHORITY ARE CLEARLY SPELLED OUT. ALTHOUGH THE COMMISSION'S GENERAL RULEMAKING POWERS UNDER THE CODE ARE BROAD (SOME SAY TOO BROAD), THE CONDITIONS ON THE EXERCISE OF THAT AUTHORITY MAKE THE IMPLICATION OF NEW PROSECUTORIAL REMEDIES IMPROBABLE. 24/ THE GENERAL RULEMAKING AUTHORITY IS CLEARLY AN ADJUNCT POWER TO IMPLEMENT EXPLICIT STATUTORY PROVISIONS ELESWHERE IN THE CODE.

ALL IN ALL THE CODE IS A COMPLEX DOCUMENT TO ASSESS. I WELCOME THE CLARITY AND PREDICTABILITY ITS ADOPTION WOULD BRING TO THE SECURITIES LAWS AND SOME OF THE SOLUTIONS IT SUGGESTS FOR THE PERCEIVED STATUTORY INADEQUACIES THAT CURRENTLY EXIST. HOWEVER, I HAVE SOME CRITICISMS.

21/ ALI CODE SECTION 1808(D).

22/ ALI CODE SECTIONS 903(D) AND 1808(G).

23/ E.G., ALI CODE SECTION 1809.

24/ ALI CODE SECTION 1804.

THE CODE DOES NOT DEAL WITH TWO HARD ISSUES. FOR YEARS THE COMMISSION HAS ASSERTED IMPLIED AUTHORITY TO DISCIPLINE PROFESSIONALS AND TO SET AUDITING STANDARDS. FOR VARIOUS REASONS, THE CODE DOES NOT TRY TO RESOLVE THESE ISSUES BUT CLAIMS TO LEAVE THE LAW ON THESE MATTERS THE SAME AS IT PRESENTLY IS. TO ME THAT WOULD BE UNACCEPTABLE. AUTHORITY TO DISCIPLINE ATTORNEYS AND ACCOUNTANTS, AND AUTHORITY FOR SETTING AUDITING STANDARDS SHOULD BE GIVEN TO THE COMMISSION CLEARLY OR DENIED IN ORDER TO AVOID SERIOUS QUESTIONS OF LEGITIMACY IN THE FUNCTIONING OF THE AGENCY.

ALSO, IN SOME RESPECTS I BELIEVE THE CODE'S EXPANSION OF THE SEC'S ADMINISTRATIVE AUTHORITY HAS NOT GONE FAR ENOUGH. FOR EXAMPLE, I WOULD SUPPORT INCREASING THE SEC'S ADMINISTRATIVE AUTHORITY OVER PUBLIC COMPANIES WHICH FILE REPORTS WITH THE AGENCY TO COVER THE OFFICERS AND DIRECTORS OF THOSE COMPANIES DIRECTLY RESPONSIBLE FOR PREPARING AND FILING REQUIRED DOCUMENTS.

ALTHOUGH I HAVE THESE CRITICISMS, I NONETHELESS BELIEVE THE CODE IS A PROPER APPROACH FOR FORMULATING NEW REMEDIES UNDER THE FEDERAL SECURITIES LAWS. IF THE COMMISSON BELIEVES CURRENT ENFORCEMENT MECHANISMS ARE INADEQUATE, IT SHOULD TRY TO ENHANCE ITS ENFORCEMENT CAPABILITY THROUGH THE LEGISLATIVE PROCESS. THE CODE PROVIDES THAT OPPORTUNITY.

IT IS NOT NECESSARILY THE ONLY OPPORTUNITY. THERE IS CURRENTLY PENDING LEGISLATION WHICH, IF ENACTED, COULD BE INTERPRETED TO GRANT TO THE COMMISSION AS WELL AS TO OTHER FEDERAL AGENCIES EXPLICIT AUTHORITY TO DISCIPLINE ATTORNEYS AND ACCOUNTANTS WHO APPEAR BEFORE THE AGENCY. THE LEGISLATION IS AT SECTION 203(A) OF S.262, THE REGULATORY REFORM BILL SUBMITTED BY SENATORS RIBICOFF AND PERCY. THE LANGUAGE IN THE BILL PROVIDES A STATUTORY BASIS FOR THE COMMISSION'S RULE 2(E) WHICH IS BASED NOW ENTIRELY ON RATHER WEAK IMPLIED AUTHORITY. THE COMMISSION HAS ALREADY COMMENTED AND TESTIFIED ON THIS BILL. IF THE COMMISSION IS TO HAVE THIS AUTHORITY, IT IS FOR CONGRESS TO DECIDE. THE FACT THAT MANY PERSONS, INCLUDING ME, BELIEVE THAT IT IS UNWISE FOR THE COMMISSION TO HAVE SUCH DISCIPLINARY AUTHORITY OVER ATTORNEYS, MAKES THE LEGISLATIVE ROUTE TO AUTHORITY ESSENTIAL TO PROPER GOVERNMENT.

BOTH S.262 AND THE ALI CODE GIVE CONGRESS THE OPPORTUNITY TO DECIDE MANY QUESTIONS THAT HAVE ARISEN AS A RESULT OF UNLIMITED IMPLICATION OF REMEDIES BOTH BY THE COURTS AND THE SEC. THAT PROCESS SHOULD NOT CONTINUE.

WHERE PRIVATE REMEDIES OR PROSECUTORIAL SANCTIONS ARE IMPLIED, I BELIEVE THAT THE SUBSTANTIVE LAW WILL EVENTUALLY SUFFER. NEW THEORIES OF LAW CAN BE INTRODUCED WITHOUT THE USUAL BURDEN OF PERSUASION. THIS IS PARTICULARLY TRUE WHEN THE VAST NUMBER OF CASES ARE SETTLED. ALTHOUGH CREATIVE ENFORCEMENT OF THE LAW IS TO BE COMMENDED AND ENCOURAGED, IT SHOULD NOT STRETCH THE CONTOURS OF A STATUTE TO THE BREAKING POINT. LEGISLATION IS THE PROPER CORRECTIVE TO INADEQUACIES IN JUDICIAL OR ADMINISTRATIVE POWER TO RIGHT PERCEIVED WRONGS.