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SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C. 20549

OFFICE OF
THE CHAIRMAN

CHAIRMAN'S OFFICE
MAILED
MAR 30 1979

Mr. Bernard H. Martin
Legislative Reference
Office of Management and Budget
Executive Office of the President
Washington, D.C. 20503

Re: Draft Bill to Amend the Federal Reports Act
("Paperwork Reduction")

Dear Mr. Martin:

This responds to your request for comments on a draft Bill to amend the Federal Reports Act, 44 U.S.C. 3512. The Commission strongly supports the goal of reducing the paperwork and reporting burdens on the public, but we cannot support the Bill as it is currently drafted. As discussed in more detail below, we believe that the Bill would establish a standard of review of the Commission's actions by the Director of the Administrative Conference that is inconsistent with the need to preserve the Commission's policy-making independence, that it could impose burdens and delays on the administrative process that far outweigh any possible benefits, that in certain respects it is needlessly vague, and that it might be construed to establish a basis for persons subject to our jurisdiction to disregard or delay essential filing and reporting requirements mandated or authorized by Congress.

At the outset, we should emphasize that "information collection" by government agencies serves many different purposes. Some information is collected purely for research purposes, perhaps with a view toward consideration of future legislation, or rule-making or other administrative efforts. Other information is collected from regulated entities for use in enforcing existing law, and in assuring that such entities are not conducting themselves in a manner inconsistent with the public interest. Finally -- and perhaps of most importance to the Commission -- information is collected that forms the basis for disclosure to the public; for example, filings by issuers of securities are designed for use by persons making investment decisions. This final task is, of course, central to carrying out the purposes of the federal securities laws.

It is important to emphasize that in collecting information disclosed by issuers, and persons subject to our regulatory jurisdiction, the Commission acts to a large degree, as a repository

for the data. The structure and specific provisions of the federal securities laws evidence the intent of Congress that most of the information is to be gathered not for the use of the government, but for use by the public. Congress has made the determination that the public is entitled to complete and accurate disclosure of material information in order to make informal investment decisions. The Commission's primary responsibility is to assure compliance with those obligations.

If the Federal Reports Act were read to give the Comptroller the authority to review or place restrictions on the collection of this sort of information, the effect would be to transfer to the Comptroller a significant part of the Commission's fundamental statutory responsibility. We do not believe that Congress, in enacting that Act, could have intended to displace the basic regulatory effort of an independent regulatory agency like the Commission without significant explanation, and we submit that the legislative history of the Act makes plain that no such change was intended. Accordingly, the Commission has taken the position that, within the meaning of the Federal Reports Act, the Commission does not "conduct or sponsor the collection of information" in connection with the Commission's implementation of the disclosure requirements of the federal securities laws, in connection with the exercise of the Commission's regulatory responsibility or, generally, in connection with the Commission enforcement activities. 1/ The General Accounting Office ("GAO") has indicated that it disagrees.

To the extent that the Commission's regulatory activities are included within the scope of the Federal Reports Act, as GAO suggests, enactment of the proposed draft could more severely diminish the ability of the Commission to carry out its statutory mandate.

Our first concern relates to the possible impact of the proposal on the Commission's independence. As we recently stated in our comments on the draft Regulatory Improvement Act of 1979, an independent regulatory agency like the Commission is currently not subject to policy or procedure review by the Executive Branch. As noted in the Report of the President's Committee on Administrative Management (Report to the Committee with Studies

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1/ To the extent that the Commission gathers information having primarily statistical significance, the Commission has always recognized its responsibilities under the Federal Reports Act. We have attached a Memorandum which we sent to the General Accounting Office on April 19, 1974, and which sets forth in detail the Commission's views in the scope of the Federal Reports Act.

of Administrative Management in the Federal Government) (1937), there are severe limits on Presidential powers vis-a-vis the independent commissions:

> "To [the independent agencies] has been parceled out complete independence in several important fields of administration. This has not been inadvertent. Congress had definitely intended to place the commissions beyond the reach of Presidential management. It is sometimes said that they are responsible to Congress in respect to their administrative duties -- the courts have so referred to them."

As an independent regulatory agency, the Commission should not be subject to review of its policy-making activities by an outside authority such as the Administrative Conference. We have noted above our view that the Federal Reports Act does not currently apply to most of the Commission's information gathering activities. The following discussion has two purposes: first to demonstrate that the policy reasons for our interpretation of present law are well grounded, and second to explain the difficulties which would arise if that interpretation were rejected and the provisions of the Bill were to apply to the Commission's disclosure and regulatory activities.

1. Hours

2 - Review

3. ceiling

Section 2 of the Bill would provide for review of "existing information collection practices" in order to assess compliance with, among other things, the burden-minimization requirements, and Section 1 would allow the Director to hold hearings on major "mandatory" collection efforts. Section 2(d) would prohibit an agency from using a standard form for information collection unless the Director of the Administrative Conference determines that the statutory standards are met. Unlike the situation under current law, an agency could not go forward with the activity unless the Director found the activity to be in compliance with the standards, or unless the agency was able to show that the activity "is nevertheless indispensable to the proper conduct of the legally mandated functions of the agency." 2/

2/ Despite our view that current law does not apply to most of the Commission's information-gathering activities, we believe that the procedures under current law are far preferable to a provision that requires a finding of "indispensibility." We do not know what would be required to support such a finding, and a reviewing court would be given no real guidance by the statute in determining how high to set that standard.

There are a number of both practical and policy-related difficulties with this sort of review. It is doubtful whether the Director of the Administrative Conference would be an expert - or even particularly familiar - with the field of securities regulation. Yet any judgment as to whether the need for information collected in a particular way outweighs the burden of collection can only be considered in the context of the agency's full regulatory program, and necessarily requires substantial familiarity and expertise with respect to that program. The Director of the Administrative Conference could not even begin to develop the expertise necessary to make such judgments unless he assembled a large staff. Even then, that staff could not obtain the vitally necessary day-to-day experience with the workings of the regulated industries and others subject to our jurisdiction, and with the ongoing administration of the federal securities laws and rules thereunder, that is necessary to make judgments about the propriety of disclosure and regulatory provisions.

• By allowing the Director to second-guess decisions about the need for data collection, and possibly overrule them on grounds unrelated to investor protection, the Commission's independence as a regulatory agency would be inappropriately impaired. This danger is particularly significant in the Commission's case, since, as noted above, data collection is the basic means of assuring full disclosure of material corporate information, and thus is a function at the heart of the Commission's statutory responsibilities.

Furthermore, such review would be inefficient. Although designed to streamline the government process, the Bill paradoxically sets up an additional layer of inter-agency review that would create additional paperwork and delays in implementing (or continuing) regulatory programs. This duplication would be particularly unjustified since the Commission usually receives comment from the public on the collection burden in response to the initial proposal of disclosure rules. A subsequent hearing would merely repeat the effort. •On top of this, there could be judicial review of the Director's decision -- all contributing to disruption and delay. 3/

3/ It is not clear from the proposal whether forms currently in use would have to be cleared with the Director as well; if so, the burden would be compounded.

We are also concerned with Section 3 of the Bill, which would add a provision that would permit the establishment of "ceilings" on information collection burdens imposed by federal agencies. We should first note that it is unclear whether such ceilings are intended to be government-wide, agency-specific, or specific to the reporting entity (or type of entity). In any event, the failure to distinguish among different kinds of information collection shows the inappropriate broad-brush nature of the proposal: the public disclosure filings fundamental to our system of securities regulation (and which serve to obviate the need for more intrusive oversight by the Commission) are apparently treated as identical to peripheral research efforts. This in turn illustrates the fundamental defect in the concept of a single information "ceiling." Given different types of reporting entities, different types of information collection activities, and the specific statutory mandates under which the Commission operates, we doubt that it is practical to assign to one entity the task of deciding the limits to be placed on information gathered from persons subject to regulatory agency jurisdiction.

Thus, we believe that the concept of a "ceiling" on information requests found in Section 3 is an unworkable response to an exceedingly complex question. Insofar as the motivation for a ceiling is the desire to shield small businesses from "over-regulation," the Commission too is sensitive to this concern. Indeed, the Commission has resently adopted various measures to reduce unnecessary regulatory burdens on small business. 4/ Nevertheless, our administration of the securities laws has shown that it is often in the course of capital raising activities by small businesses where the unfamiliar public is most in need of information.

A final major concern relates to Section 3, which appears to allow a reporting entity to refuse to provide information to

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4/ See, Memorandum dated December 29, 1978, from Ralph C. Ferrara, General Counsel, Securities and Exchange Commission, to Douglas M. Costle, Chairman, United States Regulatory Council, attached to our March 21, 1979 memorandum commenting on the Revised Regulatory Improvements Act of 1979.

the Commission "unless the information collection has been authorized" under the standards set forth in the Bill. Such a provision is likely to encourage non-compliance or delay in fulfilling important regulatory obligations under the pretext of "undue burden" -- through the raising of technical or procedural deficiencies in the approval process (e.g., inadequate consideration of alternatives in the "paperwork impact statement"). 5/ The federal courts would be forced to decide these disputes, adding unnecessarily to their dockets. And again, we must emphasize that the Commission's statutory responsibilities often depend on information collection.

More specifically, we believe it would be contrary to the public interest and wholly inconsistent with the intent of the federal securities laws to enable persons subject to those laws to insist that the Commission may not deny them a "grant, license or other benefit" despite their refusal to provide information specifically required by rules authorized by statute, because of an alleged failure by the Commission to comply with the procedural requirements of the Bill. For example, to the extent that Commission's administration of the registration provisions of the Securities Act of 1933 is regarded as involving the grant of a "license or other benefit," issuers of securities could assert noncompliance by the Commission with the requirements of the Bill, refuse to submit essential information, and then offer and sell securities to the public without adequate disclosure. Similarly, a broker-dealer registered under the Securities Exchange Act of 1934 could refuse to notify the Commission of a dangerous reduction in net capital, as required by a Commission rule, because of an alleged failure by the Commission to comply with the procedures mandated by the Bill.

5/ We are not sure how an agency is expected to evaluate "paperwork alternatives" to justify its choice when alternative means of achieving a broad policy goal are not always either apparent or definable, much less quantifiable in such a fashion that would allow the sort of cost-benefit analysis contemplated by the proposal.

Based on the foregoing, we strongly recommend that the Bill be amended to make it clear that the definition of "information" in the Federal Reports Act is limited to research-type statistical activities, and excludes reporting required in connection with statutorily-authorized regulatory or oversight efforts. However, even with such a limitation, we would object to the review portions of the Bill insofar as they would allow the Director of the Administrative Conference to pass upon the ability of the Commission to engage in information collection activities. 6/ Moreover, we believe that such terms as "prepares to collect," "significant impact" (§3509(b)), "small business" (§3512(b)), and "grant, license or other benefit" (§3513) require far more precise definition in order to reduce the number of subsequent disputes that will arise as agencies attempt to implement the law. The draft should also provide that use of forms already in use for the collection of information at the time the law is passed need not be suspended for 45 days under Section 3512(d).

We appreciate this opportunity to comment on the Bill. If you need any further assistance, please let me know.

Sincerely,

Harold M. Williams
Chairman

6/ In any event, the Bill should make clear that traditional enforcement activities — gathering information or evidence pursuant to a subpoena or other process in the course of an investigatory or adjudicatory proceeding - are outside the scope of the proposal. See 4 C.F.R. §10.6(c)(4), (5), (8) (GAO regulations exempting enforcement related information collection).