Comm'r Evans

STATEMENT OF THE HONORABLE JOHN R. EVANS, COMMISSIONER, UNITED STATES SECURITIES AND EXCHANGE COMMISSION, ON S. 1411

November 1, 1979

On behalf of the Commission, I am pleased to testify today on S. 1411, "The Paperwork and Redtape Reduction Act of 1979." The Commission strongly supports the goal of reducing the paperwork and reporting burdens on the public. Responding to legitimate expressions of concern from the business community, many of the Commission's recent regulatory initiatives have been designed to reduce these kinds of burdens, especially on small firms. */ We fully support the provisions of the Bill dealing with inter-agency cooperation and coordination as appropriate means of pursuing these goals.

We have serious concerns, however, about the provisions of the Bill that would establish a system of review of the Commission's

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*/ As just one example, the Commission recently simplified registration and reporting procedures for small businesses through the adoption of Form S-18. This form is available to certain domestic and Canadian corporate issuers who are not subject to the Commission's continuous reporting requirements for the registration of securities to be sold for cash not exceeding an aggregate offering price of $5 million. The form calls for less narrative and financial disclosure than Form S-1, the standard registration form. The form may be filed with the regional offices of the Commission, in order to facilitate handling for the issuer. Also, pursuant to corresponding amendments to Form 10-K (the annual report for certain publicly-held companies under the Securities Exchange Act of 1934), issuers may include in their initial annual report information substantially similar to that included in their Form S-18 registration statement.

information collection actions by the Office of Management and Budget. These provisions would be inconsistent with the often stated Congressional desire to preserve the Commission's policy-making independence, and could impose burdens and delays on the administrative process that outweigh any possible benefits. Moreover, these provisions are needlessly vague in certain respects, and 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. Unless the Bill is changed to meet these concerns, we cannot support its adoption.

At the outset, I must 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, rulemaking or other administrative action. Other information is collected from regulated entities for use in enforcing existing law, and to assure 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 pursuant to the federal securities laws by issuers of securities are designed for use by persons making investment decisions.

Congress has made the determination that the public is entitled to complete and accurate disclosure of material information in order to make informed investment decisions. In collecting information disclosed by issuers, and by persons subject to our regulatory jurisdiction,

the Commission is assuring that this information is available, and to a large degree serves simply as a repository for data that is intended for the use of the investing public.

In our view, the definition of "collection of information" in the Federal Reports Act under current law is limited to collection for statistical purposes, and does not authorize review of disclosure or enforcement related information gathering. */ By contrast, the definition of "collection of information" in Section 3502 of this Bill, which makes any request for information to ten or more persons in a standard form subject to the approval provisions of the Bill, appears to be far more extensive. This expansion of the scope of the Federal Reports Act is of major concern to us. We do not think that the purpose of the Bill is, or should be, to subject the Commission's disclosure and enforcement efforts to oversight by the Office of Management and Budget. We do not believe, for example, that OMB should determine whether information about possible self-dealing between corporate officers and the company ought to be disclosed in a proxy statement. The definition of "collection of information"

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*/ Although the current statutory language is somewhat ambiguous, the legislative history of the Act makes plain that the scope of the Act is relatively narrow. 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 responsiblity or, generally, in connection with the Commission's enforcement activities. On the other hand, to the extent that the Commission gathers information having primarily statistical significance, the Commission has always recognized its responsibilities under the Federal Reports Act.

is so broad, however, that it could be read as encompassing this information, which is collected on standard, statutorily authorized forms. To take another example, in the course of an enforcement action or an investigation of possible violations of the securities laws, the Commission staff might pose identical questions, in written form, to more than ten persons. Read literally, the Bill would require submission of these interrogatories to OMB for approval. The disruption of important Commission activities that could result is obvious.

The over-broad definition of "information collection" is the basis of our fundamental concern about the possible impact of the Bill. An independent regulatory agency like the Commission is currently not, and should not be, subject to policy or procedure review by the Executive Branch. But on this very point, the Bill would create substantial confusion. Section 3509 would prohibit an agency from using a standard form for information collection unless the Administrator of the Office of Federal Information Management Policy has approved the proposed information collection request. The need to preserve some agency independence is recognized by providing in paragraph (a)(3) of this section that an independent agency can override the Administrator's decision by a two-thirds vote, although a simple majority override would seem to satisfy fully the Bill's objectives. On the other hand, Section 3507, with no provision authorizing the agency to override his decision, would allow the Administrator, on his own motion, to prohibit absolutely

any information collection activity that he finds "unnecessary, for any reason," or that it does not have a "practical utility" to the agency. The relationship between proposed Sections 3507 and 3509 is, at best, difficult to understand. The extensive and apparently unlimited review power given to OMB under Section 3507 would seem to make the protections afforded by Section 3509 relatively meaningless.

Moreover, the standards in Section 3507 demonstrate that it should not apply to the Commission's requirements for disclosure to the public. These standards are based on the Government's need for the information. But Commission disclosures are based on the need of the public for the information; the information does not have "practical utility" to the Commission, but rather to the public.

There are a number of both practical and policy-related difficulties with the sort of review authority given by Section 3507 to OMB. It is unlikely that the Administrator of the Office of Federal Information Management policy would be an expert - or even particularly familiar - with the field of securities regulation. Yet any judgment as to the need for information collected can be considered only in the context of the agency's full regulatory program. The Administrator could not develop the expertise necessary to make such judgments unless he assembled a large staff. Even then, that staff could not obtain the day-to-day experience with the workings of the securities industry, and with the ongoing administration of

the federal securities laws and rules thereunder, that should form the basis of any judgments about the "necessity" of disclosure and regulatory proposals.

By allowing the Administrator, under the supervision of the White House, to second-guess decisions about the need for information collection, and possibly overrule them on grounds unrelated to investor protection, the Commission's independence as a regulatory agency would be inappropriately impaired. We note that OMB's power under the Bill is extremely expansive. Section 3507 permits the Administrator to base his decision both on the need for the information and its "utility" for the agency. OMB is given rule-making authority to carry out its supervisory functions in Section 3511. And Sections 3515 and 3516 provide that the Administrator's authority under the Bill supersedes existing laws and regulations to the extent that any conflict arises. The dangers posed by this sort of oversight power are particularly significant in the Commission's case, since, as noted above, information collection is the basic means of assuring full disclosure of material corporate information, which is the Commission's primary statutory responsibility.

Moreover, we do not believe that such review would provide any redeeming benefits. 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. The Commission usually receives comment from the public on the collection burden

in response to the initial proposal of disclosure rules, and a subsequent hearing would just be unnecessary duplication. In addition, there could be judicial review of the Administrator's decision, which also would contribute to disruption and delay. Since approval by the Administrator has only a two or five year duration, this burden would be compounded as agencies continuously submit and resubmit their rules and requirements for approval. */

The Commission is also concerned that Section 3519(a) appears to allow a reporting entity to refuse to provide information to the Commission "unless the collection of the information has been authorized" under the standards set forth in the Bill. Such a provision is

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*/ Perhaps our concerns on this point can be illustrated best through an example. The Commission recently adopted new simplified registration and reporting obligations for small businesses through Form S-18. Among other things, this form requires disclosure through a description of the company's properties, its business, legal proceedings in which it is involved, etc. Under the Bill, this form would be reviewed by OMB. Upon submission, the Administrator might simply approve the request, thereby confirming the Commission's judgment. This would merely constitute a delay in the Commission's rule-making effort. On the other hand, he could decide that such information is not sufficiently material to investors to warrant the reporting burden. We submit that the latter sort of judgment is a securities law question, not a paperwork question, and is one that the Administrator should not be empowered to make. Of course, our concern here would be alleviated if both Sections 3507 and 3509 make clear that independent agencies can override the Administrator's decision. But, then, what would the Bill accomplish, other than delay and additional administrative burdens and expense, (which, incidentally, will be paid by the taxpayers)? If the only relevant input from OMB is whether the information can be obtained elsewhere, with less burden on the public, this can be done through less cumbersome and disruptive channels.

likely to encourage non-compliance or delay in fulfilling important regulatory obligations under the pretext of raising technical or procedural deficiencies in the approval process. 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 responsibilites often depend on information collection.

As to Section 3519(b), 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 "right, privilege, priority, allotment or immunity" because of an alleged failure by the Commission to comply with the procedural requirements of the Bill. While we believe that the limiting phrase "except where the [right or privilege] is legally conditioned on facts which would be revealed by the information requested" is meant to apply in most situations that would arise under the federal securities laws, the language is extremely vague. We assume that issuers of securities could not assert noncompliance by the Commission with the requirements of the Bill as the basis for refusing to submit essential information, and then offer and sell securities to the public without adequate disclosure. It is less clear whether a broker-dealer registered under the Securities Exchange Act of 1934 might 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.

Finally, we are concerned with Section 3518(b), dealing with unlawful disclosure of information. Here, the Commission would be prohibited from releasing information collected "under this chapter" to another agency except under specific conditions. Given the breadth of the definition of information collected "under this chapter," this provision would lead to the anomolous result of placing restrictions on our release of information that was collected for the very purpose of public disclosure.

In conclusion, it is our belief that although S. 1411 may make sense as a Bill intended to apply to research-type statistical data, it makes little sense as it applies to information that is disclosure or enforcement oriented, or to the reporting obligations of regulated industries imposed by statute. Accordingly, we strongly recommend that S. 1411 be amended to narrow the definition of "collection of information" to exclude reporting required in connection with statutorily-authorized regulatory, enforcement or oversight efforts. */ In any event, Section

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*/ At the very least, 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, adjudicatory or judicial 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).

3507 should be revised to permit an agency to override the Administrator's decision to prohibit certain information collection activities, along the same lines as Section 3509, and Section 3519, dealing with refusal to provide information, should be deleted from the Bill entirely.

I appreciate this opportunity to present the views of the Commission on this Bill, and would be pleased to answer any questions that the members of the Committee might have.