Securities Litigation Reform

NASCAT

NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS

July 18, 1997

Elena Kagan
Deputy Assistant to the President for Domestic Policy
The White House
Washington, DC 20502

Dear Ms. Kagan:

In light of next week's Senate Securities Subcommittee oversight hearing on the Private Securities Litigation Reform Act of 1995 (PSLRA), the National Association of Securities and Commercial Law Attorneys (NASCAT) urges that the Clinton Administration proceed cautiously as it considers proposals to preempt private rights of action under state securities laws. We strongly oppose any legislative initiatives that would further jeopardize defrauded investors' ability to recover their losses.

Representatives of the high-tech, securities and accounting industries who advocate federal preemption of state securities laws argue that they need additional legislation to protect them from the "onslaught" of shareholder class action suits filed in state court. These hyperbolic claims provide little justification for imprudent intrusion on state securities laws. Even at its height in 1996, the number of shareholder class actions filed in state court numbered less than 100, out of some 15 million civil cases filed in state courts each year. In the five years previous, only some 35 to 55 securities class actions were filed in state court annually.

Recent studies already indicate a reversal of the 1996 aberration. According to a study by National Economic Research Associates, Inc. (NERA), "[T]here has been a slowdown in state court filings: the 19 filings [January] through April [1997]...project to a total of 57 filings for this year, approximating the 1991 to 1995 average." NERA termed the 1996 numbers "transient." (Enclosed is a copy of the *Wall Street Journal* article summarizing the studies, as well as copies of the studies' findings.)

317 MASSACHUSETTS AVE., N.E. • SUITE 300 • WASHINGTON, DC 20002
PHONE: (202) 789-3963 FAX: (202) 789-1814

Furthermore, preemption proponents seek to nullify many state laws that provide greater investor protections not found in the new federal law, including a longer statute of limitations and aiding and abetting liability.

Finally, we stress our fundamental opposition to federal preemption of state securities laws based on the current reality that **it is not clear that there will be any means for defrauded investors to recover stolen money under federal law after passage of the PSLRA.** It will take years to assess PSLRA's impact as the courts struggle to interpret its provisions. Even Stanford University law professor and preemption proponent Professor Joseph Grundfest stated last week, "The law is very much in flux."

Unfortunately, several federal district courts already have issued rulings so restrictive that they threaten almost all private enforcement. In the first of those decisions, *Silicon Graphics,* the court held that reckless wrongdoers are no longer liable to their victims under PSLRA. The Securities and Exchange Commission (SEC) took the extraordinary step of entering the case to file a brief in the district court to protest the result. Preemption of state remedies under such circumstances could leave investors with no ability to protect themselves against fraud.

As you know, an impressive array of consumer and investor advocates also oppose the current attempt to federally preempt investor protections provided under existing state securities laws. These groups are the National League of Cities, U.S. Conference of Mayors, National Association of Counties, National Association of County Treasurers and Finance Officers, Government Finance Officers Association, the Municipal Treasurers Association, the American Association of Retired Persons, Citizen Action, Consumer Federation of America, Consumers Union, Public Citizen's Congress Watch, and the U.S. Public Interest Research Group.

Bottom line, preemption proponents seek eradication of a 60-year system of dual enforcement that has served the country well since the Depression -- based on a mere 19 state courts filings, at a time when it is not certain that sufficient protections exist for investors under the new federal law. We encourage you to heed the recommendation of SEC Chairman Arthur Levitt, who counseled, "[I]t is too early to assess with confidence many important effects of the [Private Securities Litigation] Reform Act and therefore, on this basis, it is premature to propose legislative changes. The one-year time frame has not allowed for sufficient practical experience with the Reform Act's key provisions, or for many court decisions (particularly appellate court decisions) interpreting those provisions."

At a minimum, Congress should await conclusive evidence of the impact of both the PSLRA and the 1996 National Securities Markets Improvement Act, bills which have created a more difficult environment for defrauded investors and reduced regulator oversight of the industry.

We look forward to working with you over the coming months as Congress seeks to evaluate the impact of the Private Securities Litigation Reform Act and to chart a course for the future of private securities litigation.

Sincerely,

Mern Horan

Mern Horan
Executive Director

Enclosure