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## Adverse Publicity and SEC Enforcement Procedure

### Cover Page Footnote

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# ADVERSE PUBLICITY AND SEC ENFORCEMENT PROCEDURE

ROBINSON B. LACY\*

The investigative and enforcement activities of the Securities and Exchange Commission (SEC) often give rise to adverse publicity concerning private parties before any formal determination that they have violated the law. The report that a government agency suspects a person or product can cause severe harm in any field,<sup>1</sup> but the impact is especially likely to be drastic when the agency is the SEC. The daily operations of the securities industry depend on reputation and trust.<sup>2</sup> Persons subject to SEC regulation must strive for its favor, because they are confronted with regulations administered by it at every turn, and because the agency has broad discretion in administering those legal requirements.<sup>3</sup> Hence, those subject to SEC regulation will avoid association with targets of the agency's suspicions.<sup>4</sup> A quarter of a century ago, the Attorney General's Committee on Administrative Procedure found:

In the case of registration statements in respect of securities, a show-cause order reciting alleged defects often amounting to fraud, virtually suspends their marketability . . . The same—although perhaps to a less extent—is true when registration of brokers and dealers, or expulsion from an exchange, is involved. Business is difficult when attempted to be operated under the cloud of a show cause-order [sic] of this nature.<sup>5</sup>

This observation has been echoed repeatedly.<sup>6</sup>

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1. See F. Rourke, *Secrecy and Publicity: Dilemmas of Democracy* 113-36 (1961) [hereinafter cited as Rourke]. For example, an FDA press conference on suspected cranberry contamination rendered the nation's entire 1959 crop of largely healthful cranberries unmarketable, resulting in losses estimated at \$40 million. *Id.* at 127-28; Gellhorn, *Adverse Publicity by Administrative Agencies*, 86 Harv. L. Rev. 1380, 1408-10 (1973) [hereinafter cited as Gellhorn].

2. *Dolgow v. Anderson*, 43 F.R.D. 472, 501 (E.D.N.Y. 1968) (Weinstein, J.); J. Landis, *The Administrative Process* 108 (1938) [hereinafter cited as Landis]; Freeman, *A Private Practitioner's View of the Development of the Securities and Exchange Commission*, 28 Geo. Wash. L. Rev. 18, 24 (1959) [hereinafter cited as Freeman].

3. See generally K. Davis, *Administrative Law* 150-52 (1951).

4. Freeman, *supra* note 2, at 4.

5. Monograph of the Attorney General's Committee on Administrative Procedure, S. Doc. No. 10, 77th Cong., 1st Sess., pt. 13, *Securities and Exchange Commission* 43 (1941) [hereinafter cited as Monograph].

6. See E. Brodsky, *Guide to Securities Litigation* 21-24 (1974) [hereinafter cited as Brodsky]; *Securities and Exchange Commission Advisory Committee on Enforcement Policies and Practices*, Report 29 (1972), reprinted in A. Mathews, B. Finkelstein & H. Milstein, *Enforcement and Litigation Under the Federal Securities Laws* 313 (1973) [hereinafter cited as Wells Comm. Rep., with page numbers as reprinted]; P. Woll, *Administrative Law: The Informal Process* 21-24 (1963).

The potential for harm inherent in SEC-created adverse publicity demands that care be taken to ensure that action likely to give rise to adverse publicity is taken only when necessary to the SEC's regulatory responsibilities, and to minimize the impact of such publicity. Moreover, care is mandated because the harm resulting from adverse publicity is not confined to persons suspected of misconduct—employees and stockholders also are affected.<sup>7</sup> Finally, the agency should handle adverse publicity with sensitivity because it relies on the good will and voluntary compliance of most of the public.<sup>8</sup> To the extent that the SEC acquires a reputation for unfairness by causing unnecessary injury, those subject to its oversight are less likely to maintain a cooperative attitude.<sup>9</sup>

Despite these considerations, the SEC's practices affecting reputation have provoked criticism for many years.<sup>10</sup> In light of the fact that the American Law Institute is currently drafting a proposed codification and revision of all the statutes pertaining to the SEC,<sup>11</sup> it seems appropriate to consider a legislative response to the problem of adverse publicity arising from SEC operations.

It is a traditional view that the external imposition of safeguards on agency procedures is both unnecessary and undesirable. Just as New Deal proponents championed agency discretion in developing substantive legal standards,<sup>12</sup> they insisted that administrators could be trusted to act fairly. Noting the harm caused by adverse publicity arising from the SEC's initiation of enforcement proceedings, Dean Landis wrote that fairness would be assured by "professionalism in spirit, the recognition that arbitrariness in the enforcement of a policy will destroy its effectiveness, and freedom from intervening irrelevant considerations."<sup>13</sup> Similarly, the Supreme Court has stated that an agency's expertise in its field of regulation justifies deference to the procedures which it designs.<sup>14</sup>

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7. Wells Comm. Rep., *supra* note 6.

8. *Id.* at 298.

9. Persons injured by SEC action are likely to feel they have been treated capriciously, because the complexity of the legal requirements enforced by the Commission results in many unintentional violations. See 26 SEC Ann. Rep. 201 (1960).

10. Gellhorn, *supra* note 1, at 1394-98; see, e.g., *Bank of America Nat'l Trust & Sav. Ass'n v. Douglas*, 105 F.2d 100, 105 (D.C. Cir. 1939); *Silver King Mines, Inc. v. Cohen*, 261 F. Supp. 666, 674 (D. Utah 1966); Letter from A. Mathews to the Advisory Committee on Enforcement Policies and Practices (May 23, 1972), reprinted in A. Mathews, B. Finkelstein & H. Milstein, *Enforcement and Litigation Under the Federal Securities Laws 363-67* (1973) [hereinafter cited as Mathews Letter, with page numbers as reprinted].

11. See ALI Fed. Sec. Code (Tent. Drafts Nos. 1-6, 1972-77).

12. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667, 1677-78 (1975) [hereinafter cited as Stewart].

13. Landis, *supra* note 2, at 111; accord, W. Gellhorn, *Federal Administrative Proceedings 72-73* (1941) [hereinafter cited as *Administrative Proceedings*].

14. *FCC v. Schreiber*, 381 U.S. 279, 290 (1965); accord *Stone v. SEC*, 466 F.2d 316, 322 (D.C. Cir. 1972).

There is little theoretical justification for this view. Deference to administrative expertise with regard to the formulation of substantive legal requirements has surface plausibility if one is willing to assume that a technology of social engineering together with adequate data will ordinarily yield a "correct" plan for directing an area of social activity.<sup>15</sup> However, expertise concerning securities markets or public utilities does not necessarily entail a heightened sense of fairness, or competency as to procedural safeguards. Moreover, the commitment to particular governmental policies which is expected of agencies often is inconsistent with the distinct social policies favoring individual rights.

In fact, experience seems to favor the traditional confidence in administrators' fairness.<sup>16</sup> Yet, recent experience tends to undermine that confidence with respect to the SEC. Although the SEC has long been esteemed for fairness,<sup>17</sup> it has recently come under increasing criticism.<sup>18</sup> Both the Subcommittee on Securities of the Senate Banking Committee and a committee of the American Bar Association Section of Corporation, Banking and Business Law have initiated studies of alleged disregard for professional standards and due process on the part of the SEC staff.<sup>19</sup> Furthermore, the Commission has rejected most of the suggestions for new procedural safeguards advanced by its own Advisory Committee on Enforcement Policies and Practices (hereinafter referred to as the Wells Committee).<sup>20</sup> This Article will examine several features of the Commission's procedure, and the problems and proposals to which they have given rise, in order to suggest corrective legislation.<sup>21</sup>

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15. Stewart, *supra* note 12, at 1678.

16. See Administrative Proceedings, *supra* note 13, at 68-69. See also 2 L. Loss, Securities Regulation 1334 (2d ed. 1961) [hereinafter cited as Loss].

17. Wells Comm. Rep., *supra* note 6, at 1-2; Freeman, *supra* note 2, at 18.

18. Sommer, *The Commission and the Bar: Forty Good Years*, 30 Bus. Law. 5 (1974); see *Securities Enforcement: A Growth Industry—The Critics*, Sec. Reg. & L. Rep. (BNA), April 13, 1977, at AA-1 [hereinafter cited as *The Critics*]; Freedman, *A Civil Libertarian Looks at Securities Regulation*, 35 Ohio St. L.J. 280 (1974).

Former Commissioner Sommer has acknowledged the inclination of enthusiastic staff members, frustrated when dealing with more experienced private counsel, to resort to improper "strong assertions of authority." Sommer, *supra* at 12; accord, *The Critics*, *supra* at AA-6 (views of Milton Freeman and former SEC Chairman Garrett).

19. Sec. Reg. & L. Rep. (BNA), Oct. 26, 1977, at A-1; *The Critics*, *supra* note 18, at AA-2.

20. See SEC Securities Act Release No. 5310 (Sept. 27, 1972).

21. One of the few commentators to deal at length with the problem of adverse publicity caused by administrative agencies concludes that external controls must be supplied primarily by the courts. He would limit the role of legislation to making judicial review available and generally directing agencies to adopt means to assure accuracy and to issue retractions of incorrect publicity. Gellhorn, *supra* note 1, at 1434 n.220. However, the courts traditionally have been reluctant to curb alleged abuses of enforcement powers by federal agencies, see *SEC v. Wall St. Transcript Corp.*, 422 F.2d 1371 (2d Cir.), cert. denied, 398 U.S. 958 (1970); *SEC v. National*

## I. PRIVATE INVESTIGATIONS

SEC enforcement proceedings are generally preceded by a private investigation.<sup>22</sup> Typically a Regional Administrator, acting on his own authority or on directions from Washington,<sup>23</sup> will assign two staff attorneys to conduct an informal inquiry, without subpoena power.<sup>24</sup> Sometimes the staff concludes that no action is necessary, or that a warning to the offender is sufficient.<sup>25</sup> If the use of compulsory process becomes necessary, the staff members must apply to the Commission for an order for a formal investigation, authorizing the issuance of subpoenas.<sup>26</sup> The Commission's rules do not require that the target of the investigation ever be notified,<sup>27</sup> and the target is, in practice, usually not notified<sup>28</sup> until the staff is either contemplating recommending proceedings<sup>29</sup> or has decided not to recommend any action.<sup>30</sup> The target may, however, learn of the investigation from witnesses who have been called to testify.<sup>31</sup>

Despite attempts to conduct these investigations in secret, their existence usually becomes known to the public.<sup>32</sup> Witnesses may divine the staff's suspicions from the questions they are asked and from the order for the investigation,<sup>33</sup> which they are entitled to inspect.<sup>34</sup> The

Student Marketing Corp., 68 F.R.D. 157 (D.D.C. 1975), *aff'd per curiam*, 538 F.2d 404 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1073 (1977), especially alleged abuses involving adverse publicity, Rourke, *supra* note 1, at 150; *see* Schmidt v. United States, 198 F.2d 32 (7th Cir.), *cert. denied*, 344 U.S. 896 (1952). *But see* Silver King Mines, Inc. v. Cohen, 261 F. Supp. 666 (D. Utah 1966). Hence, more elaborate statutory controls seem necessary.

22. Mathews, *Witnesses in SEC Investigations*, 3 Rev. Sec. Reg. 923 (1970) [hereinafter cited as Mathews]; *see* 17 C.F.R. §§ 202.5(a), 203.5 (1977).

23. 3 Loss, *supra* note 16, at 1886, 1949.

24. 17 C.F.R. § 202.5(a) (1977); Tew & Freedman, *Practice in SEC Investigatory and Quasi-Judicial Proceedings*, 27 U. Miami L. Rev. 1, 6-7 (1972) [hereinafter cited as Tew & Freedman].

25. 26 SEC Ann. Rep. 201 (1960). In a small number of cases, the staff informally obtains an undertaking from the target. Thomforde, *Negotiating Administrative Settlements in SEC Broker-Dealer Disciplinary Proceedings*, 52 N.Y.U. L. Rev. 237, 243-45 (1977) [hereinafter cited as *Negotiating Settlements*].

26. 17 C.F.R. § 202.5(a) (1977); Wells Comm. Rep., *supra* note 6, at 302.

27. *See* 17 C.F.R. § 202.5(c) (1977).

28. Monograph, *supra* note 5, at 37; Tew & Freedman, *supra* note 24, at 7. This may be changing. A recent article asserts that "in practice most respondents are notified that their activities are under investigation . . ." *Negotiating Settlements*, *supra* note 25, at 248.

29. *See* 17 C.F.R. § 202.5(c) (1977). *See generally* text accompanying notes 69-84, 120-30 *infra*.

30. *See* 17 C.F.R. § 202.5(d) (1977).

31. Monograph, *supra* note 5, at 37.

32. Wells Comm. Rep., *supra* note 6, at 302.

33. Monograph, *supra* note 5, at 37.

34. 17 C.F.R. § 203.7(a) (1977).

first group to learn of the investigation is typically made up of those with whom the target does business, who are the most promising witnesses, yet whose knowledge of the inquiry is the most damaging to the target.<sup>35</sup> Upon learning of an SEC investigation, the public has traditionally assumed that the subject has in fact violated the law.<sup>36</sup>

Since it is ordinarily impossible to be certain whether a violation has occurred before an investigation is launched, there are serious risks of injuring innocent parties. The resulting harm to reputation would be reduced if the staff were required to give the target notice of the investigation and the nature of the suspected violation as soon as possible. This would permit the party to deny or attempt to rebut the charges. In addition, some parties might be willing to settle promptly, in order to avoid a long period of uncertainty and possibly exaggerated suspicions.<sup>37</sup> Others might also benefit from prompt notification. If the target is prepared to settle at once, agency resources will be freed for other work.<sup>38</sup> Furthermore, many issuers now disclose investigations of which they are aware in filings with the SEC<sup>39</sup> and in reports to stockholders,<sup>40</sup> thus furthering the SEC's policy of keeping investors fully informed. Of course, in some cases, notification will permit a target to impede the investigation, but the agency should be required to give notice when practicable. Notice to the target would still be a far from complete solution, because it would not be practical in every case, and because the target's necessarily self-serving denial of the charges is likely to carry less weight in the public mind than the suspicions of the Commission.

The Wells Committee suggested that all formal orders and letters accompanying subpoenas prominently display a statement that institution of an investigation does not mean that the Commission has concluded that a violation has occurred.<sup>41</sup> Recently, the Commission implemented this suggestion in part, by including in subpoenas a notice that the "investigation should not be taken as an adverse reflection on any individual, business or security."<sup>42</sup>

Although helpful, even these efforts are far from a complete solution

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35. See Merrifield, *Investigations by the Securities and Exchange Commission*, 32 Bus. Law. 1583, 1594 (1977) [hereinafter cited as Merrifield].

36. Wells Comm. Rep., *supra* note 6, at 302.

37. See text accompanying notes 113-20 *infra*.

38. Disposition of most cases by settlement is essential to SEC enforcement. See *Securities Enforcement: A Growth Industry—SEC's Expanding Programs*, Sec. Reg. & L. Rep. (BNA), April 27, 1977, at AA-1, AA-7.

39. See Wall St. J., April 6, 1977, at 38, col. 4.

40. See N.Y. Times, April 29, 1977, § D, at 1, col. 1; Tenneco Inc., 1976 Ann. Rep. 36-37 (1977).

41. Wells Comm. Rep., *supra* note 6, at 303.

42. Merrifield, *supra* note 35, at 1594.

because the Commission could never deny the *suspicion* of misconduct manifested by the investigation, and news of that suspicion would itself impede participation in the securities markets.<sup>43</sup> In any event, such statements should not be limited to inclusion in orders and subpoenas. Witnesses may be interviewed before an order or subpoena is issued,<sup>44</sup> and there is presently no requirement that every witness be shown the order once it issues.<sup>45</sup> Hence, the staff should also be required to deliver the statement in any initial communication with a witness, whether oral or in writing.<sup>46</sup>

Sometimes the staff will decide not to recommend any action against the target, but the rumors and suspicions will persist. Accordingly, the Wells Committee recommended that, where practicable, the Commission should notify the target that the staff has completed its investigation and determined not to seek proceedings.<sup>47</sup> In response, the Commission provided by rule that the staff might in its discretion advise the target that the investigation had been terminated, but warned that such notice should be construed neither as an exoneration nor as an assurance that no action would result from the inquiry.<sup>48</sup> The Commission argued that it often was difficult to tell when an investigation had been completed, and that it would be misleading to indicate that an investigation had been terminated when it might still be reopened. It also expressed concern that a notice of termination might be asserted as a defense in subsequent proceedings.<sup>49</sup>

However, the fundamental distinction between an investigation and an adjudication<sup>50</sup> would deny any *res judicata* effect to the proposed notice.<sup>51</sup> Indeed, in an early case where the respondent was represented by counsel, introduced evidence, and cross-examined witnesses during the investigation, the Commission established its authority to order proceedings even though the respondent knew of a staff recommendation of

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43. See text accompanying notes 2-5 *supra*.

44. See text accompanying notes 23-26 *supra*.

45. See 17 C.F.R. § 203.7(a) (1977).

46. Brodsky, *supra* note 6, at 25-27. In the Brigadoon Scotch investigation, the district court issued a protective order requiring such a statement, but the court of appeals reversed. *SEC v. Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1056-57 (2d Cir. 1973), *cert. denied*, 415 U.S. 915 (1974).

47. Wells Comm. Rep., *supra* note 6, at 304.

48. SEC Securities Act Release No. 5310 (Sept. 27, 1972) (codified at 17 C.F.R. § 202.5(d) (1977)).

49. *Id.*

50. See *In re SEC*, 84 F.2d 316, 317-18 (2d Cir.), *rev'd as moot sub nom. Bracken v. SEC*, 299 U.S. 504 (1936); White, Weld & Co., 1 S.E.C. 574, 575 (1936).

51. Cf. L. Jaffe & N. Nathanson, *Administrative Law: Cases and Materials* 616 (3d ed. 1968) [hereinafter cited as Jaffe] (distinction between adjudications and advisory opinions).



no action.<sup>52</sup> In addition, the difficulty in determining when a particular investigation has been concluded poses no obstacle to informing the target that the staff does not *presently* anticipate further inquiry, and does not *presently* intend to recommend proceedings. Furthermore, it would contribute to sound administration as well as to the protection of private reputation if the staff were required to complete investigations as expeditiously as practicable and to dispose of a matter one way or another.<sup>53</sup>

## II. ADJUDICATORY PROCEEDINGS

### A. *Institution of Proceedings*

The adverse publicity resulting from the institution of public enforcement proceedings may have as severe an impact on the respondent or defendant as any formal sanction ultimately imposed.<sup>54</sup> The SEC issues press releases announcing such proceedings.<sup>55</sup> Newspapers publicize the

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52. White, Weld & Co., 1 S.E.C. 574 (1936). The traditional doctrine that advice by an agency that specified conduct is legal, combined with reliance, does not estop the agency from initiating proceedings on the basis of that conduct, seems to be losing its authority. See Jaffe, *supra* note 51, at 616-22. However, mere termination of an investigation does not imply that particular conduct is legal, and it is difficult to see how a target could rely on the staff's decision not to recommend proceedings.

53. In fact, a recognition of this seems implicit in the Commission's policy of issuing formal orders for investigation which expire automatically after six months. See Mathews Letter, *supra* note 10, at 363.

54. Wells Comm. Rep., *supra* note 6, at 313.

55. 17 C.F.R. § 201.6(c) (1977). Originally, SEC press releases described the alleged misconduct in great detail and stated that the Commission had "reasonable cause to believe" the facts alleged. 3 Loss, *supra* note 16, at 1901 n.36; see Bank of America Nat'l Trust & Sav. Ass'n v. Douglas, 105 F.2d 100, 105 (D.C. Cir. 1939). In 1939, the United States Court of Appeals for the District of Columbia Circuit criticized the detailed description of the alleged misconduct as likely "to cause serious prejudice to the [affected party] and bring it, in advance of any hearing, into public disrepute." 105 F.2d at 104-05. The court also objected that the assertion that the allegations were believed to be true created an impression of prejudgment which was inconsistent with the SEC's adjudicatory responsibilities. *Id.* Subsequently, the Commission adopted a new formula, stating that members of its staff had reported certain information which, if true, tended to show that the law had been violated. See SEC Securities Exchange Act Release No. 4287 (July 25, 1949). This, in turn, was criticized by the United States Court of Appeals for the Second Circuit as creating an impression of prejudgment. *N. Sims Organ & Co. v. SEC*, 293 F.2d 78, 81 (2d Cir. 1961), *cert. denied*, 368 U.S. 968 (1962). See also Timbers & Garfinkel, *Examination of the Commission's Adjudicatory Process: Some Suggestions*, 45 Va. L. Rev. 817, 824-27 (1959). Although the notice avoids suggesting a predetermination of the facts, the court may have been concerned that it implied a prejudgment of the legal issue of whether the facts alleged constituted a violation. The formula was then revised to state that the staff charged "that information developed in its investigation tends, if true, to show" a violation. SEC Securities Exchange Act Release No. 6697 (Jan. 2, 1962). See also 6 Loss, *supra* note 16, at 4030 (Supp. 1969). Current releases state, first, that "[t]he proceedings are based upon allegations by the staff that" respondent violated certain provisions, and second, that "[a] hearing will be scheduled . . . for the

allegations of SEC complaints.<sup>56</sup> Although in the case of some administrative hearings, the Commission may order either public or private proceedings,<sup>57</sup> there are often compelling reasons to proceed publicly.<sup>58</sup> All court proceedings are public, as are all stop order hearings.<sup>59</sup> Hence, the decision to institute proceedings is of the greatest importance. Many years ago, the Commission's General Counsel remarked:

Whether the S.E.C. on final consideration will actually decide to enter a stop order is interesting, but not very important; for only a rare investor would purchase securities threatened with the administrative bar. When the S.E.C. actually delists a security, the news is important; but the market drops when the order for hearing is announced.<sup>60</sup>

Ever since the SEC was established, parties have sought an opportunity to be heard before proceedings are ordered.<sup>61</sup> A prospective defendant or respondent may be able to explain his conduct, so as to convince the Commission either to forego proceedings entirely or to drop the most serious charges.<sup>62</sup> The decision to order proceedings does not turn simply

purpose of determining whether the allegations are true . . . ." SEC Securities Exchange Act Release No. 13244 (Feb. 4, 1977). Only the most summary indication is given of the specific misconduct alleged. *See id.*

Several commentators have suggested that an agency intending to issue a notice of proceedings or other release suggesting misconduct should give the affected party an opportunity to prepare a response which would be published together with the agency's release. 1 Attorney General's Committee on Administrative Procedures, Final Report 266 (1941); Lemov, *Administrative Agency News Releases: Public Information Versus Private Injury*, 37 Geo. Wash. L. Rev. 63, 78 (1968). The Federal Securities Code provides that, where practicable, the SEC shall give advance notice to parties subject to adverse comment in public reports, in order to permit them to prepare a reply. ALI Fed. Sec. Code § 1505(d)(3) (Tent. Draft No. 3, 1974). This provision only applies to reports issued pursuant to § 1505(d)(2), and not to notices of administrative proceedings, which are authorized by § 1513(c) of the Code. This gap in the coverage of § 1505(d)(3) is surely undesirable with respect to the occasional instances in which notices of proceedings indicate misconduct by parties other than the respondent. *See Gilligan, Will & Co. v. SEC*, 267 F.2d 461 (2d Cir.), *cert. denied*, 361 U.S. 896 (1959); *Bank of America Nat'l Trust & Sav. Ass'n v. Douglas*, 105 F.2d 100, 105 (D.C. Cir. 1939). As to them, the notice is indistinguishable from a public report. And in general, the danger of imposing a sanction before an adjudication of wrongdoing seems to call for allowing the respondent an opportunity to reply to the allegations described in the notice. Further, the agency should be required to publish the reply along with its own release. This procedure would contribute to the full and accurate reporting to which the SEC is committed and, in the case of notices of proceedings, would help avoid the impression of prejudgment.

56. *See, e.g.*, N.Y. Times, April 29, 1977, § D, at 1, col. 1.

57. *E.g.*, Securities Exchange Act of 1934, § 22, 15 U.S.C. § 78v (1970); 17 C.F.R. § 201.11(b) (1977).

58. *See* text accompanying notes 96-99 *infra*.

59. Securities Act of 1933, § 21, 15 U.S.C. § 77u (1970).

60. Monograph, *supra* note 5, at 43.

61. *See* White, Weld & Co., 1 S.E.C. 574 (1936); Mathews Letter, *supra* note 10, at 363-67.

62. Mathews Letter, *supra* note 10, at 365.

on the likelihood that a violation can be proved, because the SEC does not seek formal sanctions for every known violation.<sup>63</sup> Yet, it seems impossible for the SEC to consider relevant factors such as the target's willingness to make restitution and to take measures to comply with the law unless he is allowed to be heard.

In the early case of *White, Weld & Co.*,<sup>64</sup> the prospective respondent was allowed to introduce evidence and cross-examine opposing witnesses during the investigation prior to the institution of a formal adjudicatory proceeding. However, regular use of such an extensive preliminary hearing seems inappropriate. The central purposes of conducting proceedings publicly when the respondent or defendant would prefer that they be private require that the public be promptly apprised of the SEC's charges.<sup>65</sup> These purposes would be ill-served by the delay required for elaborate proceedings before formal enforcement action is commenced. If, on the other hand, these grounds for conducting public proceedings are absent, and the respondent wishes to avoid publicity, it would be more expedient simply to order private proceedings. The SEC is required to conduct stop order proceedings publicly, but this problem would be eliminated by the proposal embodied in the American Law Institute Federal Securities Code, to give the Commission the same discretion regarding stop orders as it now enjoys respecting all other administrative proceedings.<sup>66</sup> Finally, when court proceedings are contemplated, an extensive preliminary hearing poses a severe strain on law enforcement resources. In *White, Weld & Co.*, the parties stipulated that the record of the preliminary investigation could be used in subsequent proceedings.<sup>67</sup> Even when such a stipulation is acceptable, however, it does not avoid requiring two factfinders to familiarize themselves with all the evidence. Furthermore, in some cases involving questions of credibility, it may be inappropriate for the court or administrative law judge to make a decision without observing the demeanor of the witnesses.

A number of less formal and less time-consuming procedures have been devised. The staff regularly grants requests from the targets of investigations to appear and present their side of the story.<sup>68</sup> In 1970, the Commission directed the staff to set forth separately, in recommendations for proceedings, any contentions regarding the facts or law advanced by the prospective defendant or respondent.<sup>69</sup> The Commission also permits

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63. 26 SEC Ann. Rep. 201 (1960); *Negotiating Settlements*, *supra* note 25, at 244-46.

64. 1 S.E.C. 574 (1936).

65. See text accompanying notes 96-97 *infra*.

66. ALI Fed. Sec. Code § 1513(e) & Comment 23(a) (Tent. Draft No. 6, 1977).

67. 1 S.E.C. 574, 576 (1936).

68. *But see* Mathews Letter, *supra* note 10, at 364.

69. Memorandum from the Commission to All Division Directors and Office Heads Re:

anyone who becomes involved in an investigation to submit a written statement, which is submitted along with the staff recommendation.<sup>70</sup>

These procedures provide adequate opportunity to be heard without seriously straining agency resources in normal cases. Since it is impractical to decide the legal and factual issues before the adjudicatory proceeding, the function of an opportunity to be heard at this stage is simply to alert the decisionmaker to facts of which he may be unaware, or legal and policy arguments which he may have overlooked. Hence, the aspects of a plenary hearing not afforded by these procedures—the opportunity to attack the credibility of witnesses and to rebut opposing arguments—are unnecessary. On the other hand, the procedures do not significantly burden the agency, because testimony by an involved party actually furthers the aims of the staff investigation, and a review of reasonable written statements is not very time consuming.

However, the SEC's current practice is seriously flawed because some persons are not afforded the benefit of these procedures. There is no requirement that a party be notified that proceedings against him are under consideration,<sup>71</sup> and occasionally parties do not learn that they are suspected by the Commission until public proceedings have been instituted against them, even though the staff has ample time to give notice.<sup>72</sup> The Commission has rejected the suggestion that it adopt a procedure to ensure that, where practicable, prospective defendants and respondents are apprised of the contemplated action<sup>73</sup> on the ground that it "cannot

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Procedures Followed in the Institution of Enforcement Proceedings, Sept. 1, 1970, reprinted in *SEC v. National Student Marketing Corp.*, 68 F.R.D. 157, 165-66 (D.D.C. 1975), *aff'd per curiam*, 538 F.2d 404 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1073 (1977) [hereinafter cited as Memorandum].

70. 17 C.F.R. § 202.5(c) (1977). On one occasion, the staff failed through inadvertence to deliver a written submission until after the Commission had decided to institute subpoena enforcement proceedings. The respondents' subsequent request for an oral hearing was denied. Respondents' Memorandum in Opposition to Motion To Enforce Subpoena, and in Support of Cross Motion for Protective Order at 6-7, 10-14, *SEC v. Lockheed Aircraft Corp.*, 404 F. Supp. 651 (D.D.C. 1975). The district court enforced the subpoena, remarking that respondents had admitted there was no legal ground for resisting the order. *SEC v. Lockheed Aircraft Corp.*, 404 F. Supp. 651, 652 (D.D.C. 1975).

71. *SEC v. National Student Marketing Corp.*, 68 F.R.D. 157, 163 (D.D.C. 1975), *aff'd per curiam*, 538 F.2d 404 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1073 (1977).

72. See Mathews Letter, *supra* note 10, at 363-64. In the *National Student Marketing* case, three persons who had received no indication that they were suspected before they were named defendants in an injunctive action promptly obtained summary judgment in their favor. Mathews, *Effective Defense of SEC Investigations: Laying the Foundation for Successful Disposition of Subsequent Civil, Administrative and Criminal Proceedings*, 24 Emory L.J. 567, 622 n.183 (1975) [hereinafter cited as *Effective Defense*]; see *SEC v. National Student Marketing Corp.*, 360 F. Supp. 284, 300 (D.D.C. 1973).

73. Wells Comm. Rep., *supra* note 6, at 303-04, 316-17. The suggestion was subsequently

place itself in a position where, as a result of the establishment of formal procedural requirements, it would lose its ability to respond to violative activities in a timely fashion."<sup>74</sup> The SEC referred to a case in which it obtained a temporary restraining order within four hours of learning of a broker-dealer insolvency.<sup>75</sup>

The Commission's position is unpersuasive. The suggestion was simply that notice be given where practicable,<sup>76</sup> so the possibility of emergencies, in which there is no time for notice, is irrelevant. Furthermore, in the case of administrative proceedings, the Administrative Procedure Act requires that agencies give parties an opportunity for "the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit"<sup>77</sup> before formal adjudicatory proceedings are instituted. Both committee reports on the bill explained that "[t]he agency is required first to afford parties an opportunity for the settlement or adjustment of issues . . . ."<sup>78</sup> The Senate report emphasized:

The preliminary settlement-by-consent provision of this subsection is of the greatest importance. . . . The limitation of the requirement to cases in which "time, the nature of the proceeding, and the public interest permit" does not mean that formal proceedings, to the exclusion of prior opportunity for informal settlement, lie in the discretion of any agency irrespective of the facts, legal situation presented, or practical aspects of the case. It does not mean that agencies have an arbitrary choice, or that they may consult their mere preference or convenience.<sup>79</sup>

The same policy applies to the institution of court proceedings, and in light of the potential unjustified damage to reputation, notice should be given wherever practicable.

The determination of whether notice is practicable in a particular case poses no great difficulty. Upon a proper showing, the Commission is authorized to obtain a temporary restraining order for any violation, or threatened violation,<sup>80</sup> and this is the usual practice where speed is of the essence since it is faster than holding an administrative proceed-

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renewed by practitioners. Bialkin & Grienberger, *Summary of the Meeting Between Members of the Securities and Exchange Commission and Representatives of the Federal Regulation of Securities Committee*, 30 Bus. Law. 1341, 1345 (1975).

74. SEC Securities Act Release No. 5310 (Sept. 27, 1972).

75. *Id.*

76. Wells Comm. Rep., *supra* note 6, at 316.

77. Administrative Procedure Act § 5(c)(1), 5 U.S.C. § 554(c)(1) (1970).

78. H.R. Rep. No. 1980, 79th Cong., 2d Sess. 27 (1946) (italics omitted); S. Rep. No. 752, 79th Cong., 1st Sess. 17 (1946) (italics omitted).

79. S. Rep. No. 752, 79th Cong., 1st Sess. 17 (1946).

80. See, e.g., Securities Act of 1933, § 20(b), 15 U.S.C. § 77t(b) (1970); Securities Exchange Act of 1934, § 21(e), 15 U.S.C. § 78u(d) (Supp. V 1975); Investment Company Act of 1940, § 209(e), 15 U.S.C. § 80a-41(e) (1970).

ing.<sup>81</sup> Use of this procedure whenever the SEC contemplates immediate publicity would afford a determination by a judge as to whether the circumstances required summary action for the avoidance of public injury.<sup>82</sup>

Moreover, the procedure for issuing a temporary restraining order provides valuable safeguards against unjustified injury to reputation. Such an order may not be issued without notice and opportunity for a hearing<sup>83</sup> unless "it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result . . . ."<sup>84</sup> Thus, before the Commission orders public proceedings it should be required to notify prospective defendants of the investigation, permit them to furnish testimony to the investigating staff, and allow them to submit a written statement to the Commission, unless it can demonstrate special urgency by obtaining a temporary restraining order.

### B. *The Choice Between Public and Private Proceedings*

Existing statutes give the SEC a choice of holding administrative proceedings publicly or privately, except that proceedings under the Securities Act must be public.<sup>85</sup> The proposed Federal Securities Code would give the Commission the same degree of discretion for all proceedings.<sup>86</sup> In light of the injury resulting from mere commencement of a public stop order proceeding,<sup>87</sup> permitting the agency to hold such proceedings privately is clearly desirable. The regulations foreclose a charge that the SEC conducts "Star Chamber" proceedings by providing that no hearing shall be held privately if all the respondents request a public hearing.<sup>88</sup> The Code would embody this rule in statute.<sup>89</sup> Hence, difficulty usually arises only when the agency seeks

81. 3 Loss, *supra* note 16, at 1980-81.

82. When a temporary restraining order is sought, it is unlikely that there will be any time to give advance publicity regarding the action. In addition, in granting or denying the motion, the judge will decide whether the case requires immediate action. *See* Fed. R. Civ. P. 65(b).

83. The rule says "notice" only, but "[n]otice implies an opportunity to be heard." *Sims v. Greene*, 161 F.2d 87, 88 (3d Cir. 1947).

84. Fed. R. Civ. P. 65(b). On the applicability of the rule to temporary restraining orders sought by the SEC, see 3 Loss, *supra* note 16, at 1980.

85. Securities Act of 1933, § 21, 15 U.S.C. § 77u (1970); *see* ALI Fed. Sec. Code § 1513, Comment 23(a) (Tent. Draft No. 6, 1977).

86. ALI Fed. Sec. Code § 1513(e) (Tent. Draft No. 6, 1977).

87. *See* text accompanying notes 5 & 60 *supra*.

88. 17 C.F.R. § 201.11(b) (1977).

89. ALI Fed. Sec. Code § 1513(e)(1) (Tent. Draft No. 6, 1977).

public proceedings, and the respondents would prefer a private hearing.<sup>90</sup>

Originally the SEC held almost all hearings privately.<sup>91</sup> At some point in the fifties, it began to hear most cases publicly, except for disciplinary proceedings against lawyers and accountants.<sup>92</sup> In 1970 the Commission issued an internal memorandum stating, *inter alia*, that it would ordinarily order private proceedings to avoid injury to reputation.<sup>93</sup> By 1973, however, only about a third of all hearings were private,<sup>94</sup> and in a recent interview with the author the Director of the Boston Regional Office was unable to recall a recent private hearing in broker-dealer proceedings. The regulations provide that all hearings, except on applications for confidential treatment under the Securities Act, shall be public unless otherwise ordered.<sup>95</sup>

The publicity generated by an order for public proceedings may alert the public to avoid possible ineptitude or fraud.<sup>96</sup> The public hearing may itself furnish interested parties with information allowing them to institute private litigation, a matter of special urgency because of the short statutes of limitations for some actions under the securities acts.<sup>97</sup> The hearing may also provide information helpful in prosecuting such actions.<sup>98</sup> Furthermore, publicity concerning the hearing may attract additional witnesses for the proceeding itself.<sup>99</sup>

Public proceedings also increase public awareness of SEC enforcement activity and alert regulated parties to new enforcement priorities.<sup>100</sup> Standing alone, however, these considerations do not seem to justify the injury to reputation which these hearings involve. The agency's enforcement activity receives substantial publicity, and public awareness would be adequately maintained through announcements made after a formal determination that the affected individual has violated the law. In addi-

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90. An occasional difficulty, not dealt with here, arises when some respondents want a public hearing, while other respondents in the same proceeding prefer a private hearing. See ALI Fed. Sec. Code § 1513, Comment 23(b) (Tent. Draft No. 6, 1977).

91. Gellhorn, *supra* note 1, at 1396.

92. *Id.*; Freeman, *supra* note 2; see note 95 *infra*.

93. Memorandum, *supra* note 69, at 166.

94. Gellhorn, *supra* note 1, at 1396.

95. 17 C.F.R. § 201.11(b) (1977). Similarly, whereas all disciplinary proceedings regarding lawyers and accountants were formerly private, the Commission recently initiated public disciplinary hearings. *The Critics*, *supra* note 18, at AA-9.

96. 2 Loss, *supra* note 16, at 1334.

97. See Securities Act of 1933, § 13, 15 U.S.C. § 77m (1970); Securities Exchange Act of 1934, § 18(c), 15 U.S.C. § 78r(c) (1970).

98. 2 Loss, *supra* note 16, at 1334. See also Wells Comm. Rep., *supra* note 6, at 313-14.

99. 2 Loss, *supra* note 16, at 1334; cf. *FCC v. Schreiber*, 381 U.S. 279, 294 (1965) (public FCC investigation).

100. Wells Comm. Rep., *supra* note 6, at 313-14.

tion, the Commission has other means to announce its special enforcement concerns, for example, through speeches by individual Commissioners<sup>101</sup> or through Commission releases.<sup>102</sup>

Finally, a 1967 internal SEC memorandum indicated that it is desirable to hold proceedings publicly when they involve a novel theory of liability.<sup>103</sup> This is plainly wrong. The very fact that the Commission is asserting a novel theory of liability increases the likelihood that the subject of the proceeding either has not violated the law or could not have foreseen that his conduct was illegal. Furthermore, the alternative means available to the Commission to indicate its enforcement priorities may also be used to outline new theories. Nonetheless, the legitimate grounds for publicizing administrative hearings may outweigh the concomitant injury to reputation in enough cases that one simple resolution of the public-private issue—requiring private hearings unless the respondents wish otherwise—is undesirable.

Traditionally, the SEC has not publicly stated its standards for determining whether proceedings should be public or private.<sup>104</sup> The third tentative draft of the Federal Securities Code set forth the considerations listed in the 1967 memorandum as non-binding guidelines,<sup>105</sup> but this proposal has been withdrawn.<sup>106</sup> In the absence of any better guidance than a staff memorandum never subjected to public comment, it seems advisable to allow the agency to develop appropriate guidelines.

However, the SEC should be required to articulate the applicable standards in rules adopted after notice and a public hearing.<sup>107</sup> First, because of the serious harm likely to result from a determination to proceed publicly, it is important that the decision be made evenhandedly, and on the basis of carefully thought out policy, and that the affected party be aware that the decision is so made. Second, the quality of the standards themselves would improve as a result of both public comment and of the care likely to be taken by the agency if it is required to formulate rules of general applicability. In addition, when the Commis-

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101. See, e.g., Sommer, *Going Private: A Lesson of Corporate Responsibility*, Law Advisory Council Lecture, Nov. 14, 1974, [1974-1975 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶80,010.

102. See, e.g., SEC Securities Exchange Act Release No. 13437 (Apr. 8, 1977).

103. Memorandum from Stanley Sporkin, Assistant Director, SEC Office of Enforcement, Division of Trading and Markets, to SEC Regional Offices, Aug. 23, 1967, *reprinted in* Gellhorn, *supra* note 1, at 1397 n.64.

104. See Gellhorn, *supra* note 1, at 1396-98.

105. ALI Fed. Sec. Code § 1513(e) (Tent. Draft No. 3, 1974).

106. See ALI Fed. Sec. Code § 1513(e) (Tent. Draft No. 6, 1977).

107. Specific reference to notice and hearing is required because otherwise the rulemaking, being concerned with procedure, would not be subject to the normal requirements of the Administrative Procedure Act. See Administrative Procedure Act, § 4(b), 5 U.S.C. § 553(c) (1970).



sion orders a public hearing following a request for a private hearing, it should be required to include in the announcement of the order, as published in the *SEC Docket*, its reasons for denying the request. Such a statement appears to be required by the Administrative Procedure Act.<sup>108</sup> This procedure would contribute to both the fact and the appearance of even-handedness, because it would force the Commission to articulate its grounds in terms of general standards, and because the affected party would receive an explanation of how the general standards apply to his case.

In 1964 the American Bar Association resolved to seek amendment of the SEC's rules to require that the decision to hold broker-dealer proceedings publicly or privately be made on the basis of the record developed in a preliminary, private trial-type hearing.<sup>109</sup> This seems undesirable. The delay required would thwart the purposes of holding public proceedings.<sup>110</sup> Since a decision concerning the institution of proceedings cannot turn on definite conclusions regarding the facts or the law, the opportunities to test witnesses and argue against particular legal theories, which are afforded by a trial-type hearing, are unnecessary. Instead, appropriate opportunity to be heard respecting the public-private decision can be afforded through the same procedure by which the respondent should be allowed to draw to the Commission's attention considerations it may have overlooked in connection with the initial decision to institute proceedings.<sup>111</sup> In fact, since extreme speed is not required, that procedure is especially well suited for making the public-private decision. That decision need only be made in administrative proceedings, and in contemplating such proceedings the SEC has already declined to seek, or failed to obtain, a temporary restraining order.<sup>112</sup>

### C. *Settlement Before Proceedings Are Ordered*

Prospective respondents and defendants have long sought to minimize the adverse publicity resulting from SEC enforcement activity by settling with the agency before, or immediately after, it institutes proceedings.<sup>113</sup> Advance settlement reduces injury to reputation because: (1) there is only

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108. "Prompt notice shall be given of the denial . . . of a written application, petition, or other request of an interested person made in connection with any agency proceedings. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial." *Id.* § 6(d), 5 U.S.C. § 555(e).

109. 89 A.B.A. Rep. 135 (1964).

110. See text accompanying notes 96-97 *supra*.

111. See text accompanying notes 62-79 *supra*.

112. See text accompanying notes 80-81 *supra*.

113. Freeman, *Administrative Procedures*, 22 Bus. Law. 891, 894-96 (1967).

one occasion for an agency press release and media coverage, that is, the settlement, rather than a series of newsworthy events, such as the institution, the outcome, and any significant intervening developments; (2) the SEC's announced allegations may be less serious; and (3) the language of the Commission's release may itself be the subject of negotiation, and may thus be rendered less harmful.<sup>114</sup>

Prior to 1970, the staff would enter into negotiations before proceedings were ordered.<sup>115</sup> However, the Commission prohibited this in September of 1970. At that time, the staff was permitted, but not required, to discuss the facts with the target and to indicate what violations it believed had occurred, but was told not to reveal what recommendation concerning enforcement action it planned to submit. If the target wished to discuss settlement, the staff was directed to allow him to present proposals and arguments and include them in the memorandum it submitted to the Commission.<sup>116</sup> Nonetheless, a subsequent release indicates that the Commission has construed rule 8 of its Rules of Practice,<sup>117</sup> which appears to pertain to offers of settlement during administrative proceedings,<sup>118</sup> to authorize the target to submit an offer of settlement before proceedings are commenced.<sup>119</sup> In addition, the Commission sometimes accedes to requests that it authorize the staff to negotiate a settlement before proceedings are ordered.<sup>120</sup>

Of course, none of these procedures are available to a party who has not been notified of the staff's suspicions until after proceedings have been commenced. The Commission's failure to ensure that such notice is given violates its obligation under the Administrative Procedure Act to afford an opportunity to submit offers of settlement prior to the commencement of formal administrative proceedings, denies equal justice in all cases, and should be corrected by requiring notice before proceedings are instituted, where practicable, as described above.

The SEC's practice regarding Securities Act registrations involves an especially serious failure to provide an opportunity for "offers of settlement, or proposals of adjustment"<sup>121</sup> before instituting administrative proceedings. The staff is rarely satisfied with registration statements as initially submitted, but in most cases it notifies the registrant of the

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114. Merrifield, *supra* note 35, at 1626-27; Mathews Letter, *supra* note 10, at 385, 388.

115. Wells Comm. Rep., *supra* note 6, at 318-19; Mathews Letter, *supra* note 10, at 384-85.

116. Memorandum, *supra* note 69.

117. 17 C.F.R. § 201.8 (1977).

118. See 17 C.F.R. § 201.1 (1977).

119. See SEC Securities Exchange Act Release No. 12255 (March 25, 1976).

120. Merrifield, *supra* note 35, at 1629; *Effective Defense*, *supra* note 72, at 624. This procedure was apparently used in SEC Securities Exchange Act Release No. 12254 (March 25, 1976).

121. Administrative Procedure Act § 5(b)(1), 5 U.S.C. § 554(c)(1) (1970).

necessary amendments without recommending stop order proceedings.<sup>122</sup> However, a proceeding is instituted without affording the registrant a *locus poenitentiae* "when the deficiencies appear to stem from careless disregard of the statutes and rules or a deliberate attempt to conceal or mislead or where the Commission deems formal proceedings necessary in the public interest."<sup>123</sup> A private investigation may be conducted before proceedings are launched, but this is not essential.<sup>124</sup> Institution of a stop order proceeding renders the securities unmarketable whether or not a formal sanction is ultimately imposed.<sup>125</sup>

This procedure is inexcusable. An improperly prepared registration presents no imminent threat to the public. It does not become effective for twenty days,<sup>126</sup> ample time to suggest amendment or withdrawal of the application. If the errors are due to negligence, this procedure may punish the issuer for the failings of its lawyer. Furthermore, Congress has provided an appropriate deterrent to wilfully filing a defective registration statement by making it a felony.<sup>127</sup>

A former Commissioner attempted to justify this practice on the grounds that "[i]n these cases, the use of the letter of comment which was designed to assist registrants who have conscientiously attempted to comply with the act would be meaningless."<sup>128</sup> This assumes the letter of comment procedure is a matter of administrative grace. In fact, while the Securities Act appears to contemplate that a stop order proceeding would be the normal response to defective registration statements,<sup>129</sup> it would be impossible for the SEC to operate on this basis.<sup>130</sup> The burden of justification lies with the necessarily extraordinary use of the formal procedure. Moreover, if the SEC actually operated as contemplated by the statute, institution of stop order proceedings would be a normal incident of issuing securities and such proceedings would not have the severe impact which they now have. Hence, the lack of safeguards in the statute does not justify the Commission's failure to create them as part of the nonstatutory procedure it has developed. The SEC should be re-

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122. 1 Loss, *supra* note 16, at 273.

123. 17 C.F.R. § 202.3(a) (1977).

124. 1 Loss, *supra* note 16, at 274-75.

125. See text accompanying note 60 *supra*. Of course, since almost all registration statements are defective in some respect when filed, the Commission will always have a legal basis for imposing the sanction.

126. Securities Act of 1933, § 8(a), 15 U.S.C. § 77h(a) (1970).

127. *Id.* § 24, 15 U.S.C. § 77x (1970 & Supp. V 1975).

128. Orrick, *Organization, Procedures and Practices of the Securities and Exchange Commission*, 28 Geo. Wash. L. Rev. 50, 63 (1959).

129. See Securities Act of 1933, § 8(b), (d), 15 U.S.C. § 77h(b), (d) (1970).

130. For another instance in which the statute is unworkable as written, see 1 Loss, *supra* note 16, at 277-79 (standard 20-day waiting period after last amendment).

quired to notify a registrant of deficiencies in a filing and allow it to take corrective action, before ordering formal proceedings.

The SEC has never formally announced the various procedures for seeking a settlement before proceedings are commenced. The decision not to let the staff negotiate settlements was unknown even to experienced practitioners until it was mentioned in a published interview with several Commissioners and staff members six months later.<sup>131</sup> The memorandum itself, which specified the procedures to be followed when a party involved in an investigation wishes to discuss settlement, only became public when it was appended to a published court opinion.<sup>132</sup> An experienced practitioner disclosed the possibility of obtaining Commission authorization for negotiations before proceedings are ordered in a law review article<sup>133</sup>—he himself apparently did not learn of the procedure for some time after it became available.<sup>134</sup>

The SEC's secretiveness violates section 3(a) of the Administrative Procedure Act: "Each agency shall separately state and currently publish in the Federal Register for the guidance of the public— . . . (B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available."<sup>135</sup> The House Report on the Administrative Procedure Act specifically noted that "[p]ursuant to section 3(a) agencies would be required to state settlement procedures in their rules."<sup>136</sup>

The Commission's secretiveness is also administratively unsound. Presumably, informal settlement procedures are made available because they serve the public interest. The public interest would seem better served if more people knew about these procedures and were able to use them. Secrecy also denies equal justice. Parties represented by counsel who do not work with the staff on a regular basis are denied opportunities to avoid serious injury to reputation which are available to the clients of a privileged coterie of insiders. The Senate Report on the Administrative Procedure Act commented: "[Section 3(a)] has been drawn upon the theory that administrative operations and

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131. See Mathews Letter, *supra* note 10, at 386.

132. See Memorandum, *supra* note 69.

133. *Effective Defense*, *supra* note 72, at 624.

134. See Mathews Letter, *supra* note 10, at 389 n.23. Similarly, the fact that the staff will regularly permit an affected party to appear and testify, see text accompanying note 68 *supra*, does not appear in the regulations, and the longstanding practice of allowing such parties to submit written statements to the Commission was not formally announced until SEC Securities Act Release No. 5310 (Sept. 27, 1972); see Wells Comm. Rep., *supra* note 6, at 315-16.

135. Administrative Procedure Act § 3(a)(1)(B), 5 U.S.C. § 552(a)(1)(B) (1970).

136. H. R. Rep. No. 1980, 79th Cong., 2d Sess. 27 (1946).

procedures are public property which the general public, rather than a few specialists or lobbyists, is entitled to know or to have the ready means of knowing with definiteness and assurance."<sup>137</sup> Finally, secret procedures preclude salutary public criticism and comment.

The Wells Committee<sup>138</sup> and others<sup>139</sup> have suggested that the Commission reinstitute, on a regular basis, the practice of allowing the staff to negotiate settlements before recommending proceedings. To be sure, for the purpose of preventing injury due to adverse publicity, an opportunity to settle is substantially less important than an opportunity to convince the agency not to institute public proceedings. The small broker who may be put out of business by the announcement of proceedings<sup>140</sup> has little to gain from a simultaneous announcement that he has consented to the imposition of a sanction. Settlement is desired by parties who can weather both the adverse publicity resulting from the proceedings and the sanction to which they are prepared to consent. On the other hand, the agency can settle, and therefore handle, more cases if it negotiates settlements in advance.<sup>141</sup> And, by avoiding needless injury to reputation, it contributes to the good will and cooperativeness of parties subject to its regulation.

Commissioner Herlong justified the 1970 directive on the ground that the staff was putting unfair pressure on parties to settle by threatening proceedings which might never occur.<sup>142</sup> But all settlement negotiations, whether conducted before or after proceedings are commenced, involve efforts by both sides to avoid something which might never happen. Negotiations by the SEC staff before proceedings are ordered are actually less susceptible of abuse than other, similar kinds of bargaining. In criminal cases, for example, plea bargaining creates a danger that the prosecutor will make more serious charges than are justified in order to cow the defendant, with the result that a party insisting on a trial runs the risk of an excessive sentence.<sup>143</sup> This danger is reduced in the case of the SEC because the Commission, which does not participate directly in the bargaining, reviews the staff's recommendation before proceedings are commenced. In any event, many of those whom Commissioner Herlong wished to protect would prefer to take their chances with negotiation.<sup>144</sup>

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137. S. Rep. No. 752, 79th Cong., 1st Sess. 12 (1946).

138. Wells Comm. Rep., *supra* note 6, at 319; *The Critics*, *supra* note 18, at AA-13.

139. E.g., Mathews Letter, *supra* note 10, at 384-89.

140. Brodsky, *supra* note 6, at 23.

141. Mathews Letter, *supra* note 10, at 387.

142. *Id.*

143. *People v. Byrd*, 12 Mich. App. 186, 206, 162 N.W.2d 777, 787 (1968) (Levin, J., concurring).

144. Mathews Letter, *supra* note 10, at 388-89.

Other Commissioners have justified the decision not to allow negotiation before proceedings were ordered on the ground that when a settlement was worked out in advance, the Commission was deprived of its discretion to decide whether to institute action.<sup>145</sup> Of course, the Commission regularly reviews proposals negotiated after formal action is commenced.<sup>146</sup> Nevertheless, if the staff and the affected party have agreed on appropriate measures before the case is presented to the Commission for the first time, it never receives competing accounts of the issues on the basis of which it may determine what sanctions are appropriate.<sup>147</sup>

The Commission's control over instituting proceedings is, however, of attenuated importance when a settlement is reached in advance. One reason for not delegating authority to initiate formal action is the damage to reputation which may result from the determination;<sup>148</sup> yet parties wish to settle precisely to avoid injury to reputation. Furthermore, instituting proceedings when a settlement has already been reached does not involve a significant commitment of agency resources. The enforcement interests of the SEC and the interests of the private party are well represented in settlement negotiations. Thus, there seems little reason for denying parties an opportunity to negotiate before proceedings are ordered.

Still, this does not seem an appropriate matter to resolve by statute. The impact on reputation of denying an opportunity to negotiate a settlement is not grave, if parties are afforded an opportunity to be heard in most cases and to submit a settlement proposal before proceedings are ordered. The decision whether negotiation should be allowed involves issues concerning the allocation of responsibilities within the SEC, which are particularly within the competence of the Commission. Finally, the Commission has demonstrated a willingness to experiment with the procedure and has discarded it on the basis of experience.

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145. *Id.* at 386-87.

146. *See* 17 C.F.R. § 201.8(a)(3) (1977).

147. Mathews Letter, *supra* note 10, at 387. In addition, it would seem troubling for the SEC to decline to impose a sanction when both the staff and the private party agree that the law has been violated, and the target is willing to accept a sanction. Of course, prosecutorial authorities in this country are generally recognized to have discretion not to prosecute, even when a violation has occurred, but this is often justifiable because of the need to allocate scarce law enforcement resources to the most pressing social needs, a factor not present when a party consents to imposition of a sanction.

148. Monograph, *supra* note 5.

### III. PUBLIC REPORTS CONCERNING PARTICULAR VIOLATIONS

The SEC is authorized to publish information concerning violations which it discovers in investigations.<sup>149</sup> This authority is often put to legitimate use in connection with legislative and rulemaking activity.<sup>150</sup> In a few instances, however, the SEC has issued a report concerning wrongdoings by particular parties, without a legislative or quasi-legislative purpose and without a prior adjudication of misconduct.<sup>151</sup>

This procedure imposes a serious sanction on a private party without the safeguards of the procedure set forth in the Administrative Procedure Act<sup>152</sup> and without the usual opportunity for judicial review.<sup>153</sup> Thus, it is inconsistent with statutory policies regarding procedure and review.

In addition, this procedure raises serious constitutional questions. Justice Frankfurter, in his concurring opinion in *Hannah v. Larche*,<sup>154</sup> wrote:

In appraising the constitutionally permissive investigative procedure claimed to subject individuals to incrimination or defamation without adequate opportunity for defense, a relevant distinction is between those proceedings which are preliminaries to official judgments on individuals and those . . . charged with responsibility to gather information as a solid foundation for legislative action. . . . When official pronouncements on individuals purport to rest on evidence and investigation, it is right to demand that those so accused be given a full opportunity for their defense . . .<sup>155</sup>

149. Securities Exchange Act of 1934, § 21(a), 15 U.S.C. § 78u(a) (1970).

150. See, e.g., SEC, Report on Questionable and Illegal Corporate Payments, *reprinted in*, Fed. Sec. L. Rep. (CCH) No. 642, pt. II (May 19, 1976). Of course, even such reports pose a serious danger of injury to private reputation. The Federal Securities Code would require that, if practicable, a party subject to adverse comment in a report be notified in advance and given an opportunity to prepare a reply. ALI Fed. Sec. Code § 1505(d)(3) (Tent. Draft No. 3, 1974). See also note 55 *supra*.

151. See *Ward La France Truck Corp.*, 13 S.E.C. 373 (1943); *Alleghany Corp.*, 6 S.E.C. 960 (1940). SEC Staff Report on Transactions in Securities of the City of New York (Aug. 29, 1977), *excerpted in* Sec. Reg. & L. Rep. (BNA), Aug. 31, 1977, at E1-E7. See also *Schmidt v. United States*, 198 F.2d 32 (7th Cir.), *cert. denied*, 344 U.S. 896 (1952).

152. The notice requirements of the Administrative Procedure Act are applicable only when an adjudication on the record after opportunity for a hearing is required by the specific applicable statute. Administrative Procedure Act § 5(a), 5 U.S.C. § 554(a) (1970). There is no such requirement in the section of the Securities Exchange Act authorizing public reports. Securities Exchange Act of 1934, § 21(a), 15 U.S.C. § 78u(a) (1970).

153. See *Schmidt v. United States*, 198 F.2d 32 (7th Cir.), *cert. denied*, 344 U.S. 896 (1952); *Gellhorn*, *supra* note 1, at 1437-38.

154. 363 U.S. 420 (1960).

155. *Id.* at 489 (Frankfurter, J., concurring).

In *Hannah*, the challenged procedure was sustained because the investigation involved was primarily legislative, and because the injury to reputation complained of was not the result of any "affirmative determinations made by the Commission," but simply of the investigation itself.<sup>156</sup>

In *Jenkins v. McKeithen*,<sup>157</sup> the Court adopted Justice Frankfurter's position<sup>158</sup> in holding that the procedure of a Louisiana commission violated the due process clause. Although the commission had no authority to make binding adjudications, the Court concluded that its primary function was to "expos[e] violations of criminal laws by specific individuals," in part because its findings were not expected to be used as a basis for legislation.<sup>159</sup> Under these circumstances, the Commission's procedure was to be measured against the requirements for a criminal trial.<sup>160</sup>

*Jenkins* may have been overruled, *sub silentio*, by the Court's recent decision in *Paul v. Davis*,<sup>161</sup> that the Louisville, Kentucky, police were not required to afford any procedural safeguards before circulating a list of "active shoplifters" to area merchants, containing respondent's name and photograph. Justice Rehnquist placed the holding on the broad ground that a good reputation is not included in the "liberty or property" protected by the fourteenth amendment's due process clause.<sup>162</sup> However, Justice Rehnquist's opinion is exceedingly problematic. The basic premise is that liberty and property are limited to certain interests enumerated in the Bill of Rights and interests recognized and protected by state law.<sup>163</sup> Justice Rehnquist recognized that most states provide legal protection for reputation.<sup>164</sup> But he appears to have advanced the theory that, before a due process violation could be found, officials must not only invade an interest protected by state law but must also exclude the individual from the class of persons whose interests are protected by the specific rule of law.<sup>165</sup> This would mean that the murder of a prisoner by a policeman acting in the course of his duties would not deny due process.<sup>166</sup> Hence, the scope of the

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156. *Id.* at 441-43.

157. 395 U.S. 411 (1969).

158. *See id.* at 428. Only three Justices joined in the Court's opinion, but two others would have gone further and overruled *Hannah*. *See id.* at 432-33.

159. *Id.* at 427.

160. *Id.* at 428.

161. 424 U.S. 693 (1976).

162. *Id.* at 711-12.

163. *Id.* at 710-11 & n.5.

164. *Id.* at 697.

165. *Id.* at 711.

166. *See Screws v. United States*, 325 U.S. 91 (1945).



limitation on due process protection announced in *Paul v. Davis* is in doubt.

In addition, rather than overruling *Jenkins v. McKeithen*, *Paul v. Davis* appears to distinguish that case, noting that the Louisville police were not "an agency whose sole or predominant function, without serving any other public interest, [was] to expose and publicize the names of persons it [found] guilty of wrongdoing."<sup>167</sup> Justice Rehnquist also attached importance to the fact that the actions of the police fell "far short of the more formalized proceedings" sustained in *Hannah*.<sup>168</sup> Thus, the central concern of *Paul v. Davis* may be simply to permit local agencies to issue prompt, informal warnings to the public.

There is no reason why the SEC should continue to have authority to issue nonlegislative reports on individual wrongdoing. Unlike some agencies which have publicized misconduct extensively,<sup>169</sup> the SEC has extensive formal enforcement powers.<sup>170</sup> One of the Commission's formal reports on individual misconduct seems to have been intended to publicize the obligations imposed by the new rule 10b-5,<sup>171</sup> but the agency has ample alternative means to alert the public to its responsibilities.<sup>172</sup> In fact, the SEC has made little use of this authority.<sup>173</sup> The authority to issue reports on the wrongdoing of individuals has also been used to block judicial oversight of the misconduct of agency personnel.<sup>174</sup> This seems clearly improper from the point of view of the Commission as well as of the injured private party. The SEC's power to issue reports concerning unadjudicated misconduct should be limited to reports for a legislative or quasi-legislative purpose.

#### IV. STATEMENT OF POLICY

Some of the SEC's questionable use of, or failure to control, adverse publicity can be corrected directly by legislation. However, in many instances it is necessary to rely on agency rulemaking or on the ad hoc discretion of the Commission and staff. To govern both rulemaking

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167. 424 U.S. at 706 n.4.

168. *Id.*

169. Gellhorn, *supra* note 1, at 1398-406.

170. In fact, the SEC has provided a trial-type procedure before issuing some reports of misconduct. Monograph, *supra* note 5, at 39; see *Alleghany Corp.*, 6 S.E.C. 960, 961 (1940) (*semble*). Hence, there seems little objection to requiring it to employ formal sanctioning processes whenever it wishes to expose wrongdoing.

171. See *Ward La France Truck Corp.*, 13 S.E.C. 373, 374 (1943).

172. See text accompanying notes 101-02 *supra*.

173. The author has discovered only two such reports in the first 44 volumes of the S.E.C. Reports.

174. See *Schmidt v. United States*, 198 F.2d 32 (7th Cir.), *cert. denied*, 344 U.S. 896 (1952).

and ad hoc decisions, a statutory statement of policy is desirable.<sup>175</sup> In the past, the SEC has shown little sensitivity to the problems of injury to reputation, and in some instances it has used publicity for improper purposes.

In particular, the threatened or actual use of adverse publicity to punish represents a significant abuse of agency discretion. Punishment would seem to be the only purpose underlying the Commission's institution of stop order proceedings without previously allowing the registrant an opportunity to amend.<sup>176</sup> The staff also uses the threat of adverse publicity to extract concessions from registrants.<sup>177</sup> In at least one case the SEC apparently issued adverse publicity over a period of years in order to put pressure on an issuer.<sup>178</sup>

The SEC's broad authority to issue reports or otherwise take action creating adverse publicity does not constitute authority to use publicity as a sanction.<sup>179</sup> The House report on the Administrative Procedure Act stated:

In short, agencies may not impose sanctions which have not been specifically or generally provided for them to impose. . . .

One troublesome subject in this field is that of publicity, which may in no case be utilized directly or indirectly as a penalty or punishment save as so authorized. Legitimate publicity extends to the issuance of authorized documents . . . but, apart from actual and final adjudication . . . no publicity should reflect adversely upon any person . . . in any manner otherwise than as required to carry on authorized agency functions and necessary in the administration thereof. It will be the duty of agencies not to permit informational releases to be utilized as penalties or to the injury of parties.<sup>180</sup>

Accordingly, the Act provides that "[a] sanction may not be imposed . . . except . . . as authorized by law."<sup>181</sup>

Thus, it should be provided by statute that the SEC shall avoid creating adverse publicity concerning private parties except as necessary for the performance of authorized agency functions, that reasonable steps shall be taken to minimize the impact of inevitable adverse publicity unless the publicized misconduct has been made the subject of a formal sanction, and that in no event shall publicity be used for the purpose of punishment except following an adjudication of misconduct.

175. For an example of such a policy statement, see Environmental Policy Act of 1969, 42 U.S.C. §§ 4331-4335 (1970).

176. See text accompanying notes 122-23 *supra*.

177. Rourke, *supra* note 1, at 130-31; Gellhorn, *supra* note 1, at 1406 n.107.

178. Silver King Mines, Inc. v. Cohen, 261 F. Supp. 666, 674 (D. Utah 1966).

179. SEC v. Harrison, 80 F. Supp. 226, 229 (D.D.C. 1948), *petition for rehearing denied*, 184 F.2d 691 (D.C. Cir. 1950), *vacated as moot*, 340 U.S. 908 (1951) ("investigations ought to be so conducted that harmful publicity will not be used in lieu of sanctions provided by law"); Bank of America Nat'l Trust & Sav. Ass'n v. Douglas, 105 F.2d 100, 105 (D.C. Cir. 1939).

180. H. R. Rep. No. 1980, 79th Cong., 2d Sess. 40 (1946).

181. Section 9(a), 5 U.S.C. § 558(b) (1970).