



Securities Regulation & Law Report®

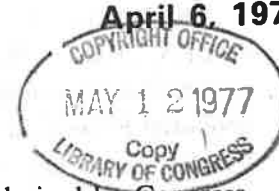
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SUMMARY

April 6, 1977



SECURITIES ENFORCEMENT: A GROWTH INDUSTRY

The SEC's Enforcement Division is the Commission's gleaming gem, admired by Congress and viewed with awe by corporations. Yet it is also the aggressive Enforcement Division that draws some of the sharpest criticism to be directed at any federal agency. Detractors claim the Division can be petty and inconsistent, neglecting major securities problems. Others claim due process flies out the window when the Division decides to strike. For the past several months, BNA has scrutinized the Enforcement Division, interviewing scores of agency officials and private attorneys, visiting self-regulatory organizations, and using the Freedom of Information Act to pry loose hitherto-unreported agency enforcement data. A resulting series, "Securities Enforcement: A Growth Industry," begins this week. (Page AA-1)

THE ACCOUNTING CONTROVERSY: AICPA'S OLSON RESPONDS IN BNA INTERVIEW

The accounting profession may have been gripped by controversy and scalded by criticism, but one of its principal spokesmen remains confident about the future. Wallace E. Olson, president of the American Institute of Certified Public Accountants, spoke about the accounting controversies and answered the profession's critics during a BNA interview. He concedes accountants "didn't move fast enough" to prevent past abuses, but he opposes taking away the profession's traditional self-regulatory powers and vesting them in the federal government. "The public sector would do worse." (Page D-1)

FUND, ADVISER DID NOT BREACH FIDUCIARY DUTIES IN DECIDING TO FOREGO RECAPTURE OF COMMISSIONS

The mutual funds industry, beset with an array of problems, 396 SRLR A-3, is still being haunted by a ghost from its past — the recapture of excess brokerage commissions. A recent development, however, should prove heartening. The U.S. Court of Appeals for the Second Circuit concludes that a fund's investment adviser and its interested directors did not breach their fiduciary duties in deciding not to recapture commissions. The case is nonetheless remanded for trial; the possibility of recapture was not disclosed in proxy statements. (Tannenbaum v. Zeller, CA 2, 3/4/77)

Analysis: *The Tax Reform Act of 1976; boycotts, tax avoidance, foreign income changes for corporations* B-1

**NEWS & COMMENT****Securities Enforcement:
A Growth Industry****Cops Patrolling
The White Collar Beat***First of a Series*

When Gerald Boltz, the SEC's Los Angeles regional administrator, urged the Commission a year ago to beef up its regional office enforcement staff, he got a prompt and definitive response.

No.

For Boltz, it seemed just another confirmation that the agency had accorded his regional office -- and the eight others spread across the country -- a secondary status that belied their actual importance in the enforcement process. Perhaps just as demoralizing, the understaffed regional offices sometimes went unconsulted before major cases were filed against companies in their locales. Boltz's own regional office, a continent away from SEC headquarters, seemed a stepchild in the enforcement process. So he stirred internal controversy by proposing that the Commission "reallocate" some of its Enforcement Division personnel among the regional offices, giving the regions major new regulatory responsibilities in the process.

Boltz's suggestion wasn't adopted. But the fact that he was disgruntled enough to make the suggestion says something about the SEC's highly-regarded enforcement mechanism. It is generally viewed as the most effective in government (a House report recently called it the best, 372 SRLR A-5, and most private attorneys concede the point). The Enforcement Division is the Commission's gleaming gem, admired by Congress and viewed with awe by corporations. Stanley Sporkin, its 45-year-old director, is better known in many circles than the SEC chairman. His visage has looked out, at one time or another, from nearly every major magazine and newspaper.

It is also Sporkin's division, with its aggressive young attorneys, that draws some of the sharpest criticism to be directed at any federal agency. Detractors claim the Division can be petty and inconsistent, neglecting major securities industry problems. Others claim due process flies out the window when the Division decides to strike. And many have accused Sporkin of overstepping his jurisdiction in helping to force major managerial changes in corporations that have confessed to making illegal or questionable foreign and domestic payments.

For the past several months, a BNA investigative reporting team has scrutinized the Enforcement Division. BNA interviewed over four dozen agency officials and private attorneys in Washington, New York, Chicago, and Los Angeles; visited the four leading stock exchanges and the NASD (over-the-counter market) to assess the quality of securities self-regulation; reviewed scores of newspaper, magazine, and law review articles that related to the enforce-

ment process; and used the Freedom of Information Act in an effort to pry loose hitherto-unreported agency enforcement data.

BNA wanted to know how the Division set its priorities; what those priorities are; how effectively the Division carries out its mandate to prevent fraud in the securities industry; and how well the Division gets along with the private attorneys that practice before it.

Boltz, in addition to his unsuccessful effort to grab off some home office Enforcement Division jobs for the regional offices, had also questioned how well the Division functioned. The problem, he says in retrospect, was a lack of communication between the home office and the regional offices. The regionals seemed like second-class citizens; they sometimes didn't even know about investigations Sporkin's home office staff was conducting in their area. Today, Boltz offers a solution:

"Perhaps the regional offices should become knowledgeable of, and responsible for, oversight of companies located in their region. They could become familiar with their filing and become knowledgeable about the quality of their counsel, management, and accountants. We can become a focal point -- a source to get that information -- and we can do a better job of monitoring those companies.

"I think it is something we haven't achieved. We could do a better job. You see, the regional offices frequently don't even get involved, and may not be particularly knowledgeable about a company. Registration statements are filed and reviewed in Washington. We may be more or less in the dark.

"I think if we can get more involved in the overall process of the Commission at an earlier stage, then we can do a better job, not just in enforcement, but also in a preventive kind of way."

Does Sporkin take such criticism seriously? "Obviously, it's a nitpick," Sporkin says. "There had to be a balance between a good regional office operation as well as an effective home office operation. If there are other agencies that have failed, it is because they do not have that home office capability. I have talked to two or three other agencies who have now come to us and said, 'Look, you guys know how to do it. Tell us -- What is your secret?'"

Sporkin concedes that the regional offices "without question" are the enforcement program's backbone. But he says his home office staff can bring an added dimension to the enforcement process by focusing on nationwide problems on a programmatic basis.

To Boltz, who once worked in the SEC's Washington headquarters, the Enforcement Division is "insular" -- more concerned with "inter-office politics." Regional offices, on the other hand, are "concerned more about doing a good job in the courts . . . We are more sensitive to what the community thinks about the SEC."

"It makes sense from an economic standpoint, if nothing else, that if you have an investigation where most of the work needs to be done in California, there should be sufficient staff on the Commission in California to do the job without bringing in a lot of people from Washington, or wherever, who are on per diem, who are traveling, who are here today and gone tomorrow.

"The same is true for litigation. It is essential that, if the Commission is going to do a good job in litigation -- and I don't think we always have -- it takes lawyers who are here, who know the courts, who know the judges, who know local rules. But more importantly, it takes lawyers who can give a continuing kind of service to the case.

"It used to trouble me that we weren't using our resources effectively. On one hand, we were very short of travel funds, and very short of money generally, to conduct our enforcement operation. On the other hand, cases as far away as California were not infrequently being investigated from Washington. And even litigated. To some extent, there is still some of that, although it has diminished a great deal."

Today, Boltz says some improvements have been instituted, or proposed, under the regime of another Californian, former Chairman Roderick Hills. Communication between the regional offices and the home office has been improved. The Commission's central files also are being placed on micrographics, and the regional offices soon may have computerized access to them.

Moreover, Boltz says the Commission also is considering a proposal to make the regional offices responsible for reviewing the stock registration statements and regulatory filings of small business in their regions. (Already, the regional offices are responsible for reviewing short-form Regulation A stock registration statements for corporations in their area).

How do the other regional administrators view their role in the enforcement process?

Paul Leonard, administrator of the Washington, D.C. Regional Office, says his proximity to headquarters means that his staff has few of the logistical problems that plague the other regional offices. But nonetheless, he concedes, "glamorous things happen in the Division that we would like to be actively participating in."

Leonard also says, "we read in the paper of investigations in this region after they have been filed" by the Enforcement Division. Leonard would like his staff to handle more of the enforcement matters concentrated in his region. However, even if a Commission directive came down today, mandating that the regional offices handle more enforcement matters, it couldn't be done. As Leonard notes: "Given the strength of this office we couldn't possibly service the public interest without a stronger complement of personnel, which would basically involve a consideration of decentralizing [the Division.]"

Adds New York Administrator William D. Moran, whose 225-man regional staff is the SEC's largest: "Can we use more help? Yes. Should we break up headquarters' office to get more help? No. Period."

"If Boltz said those things, I disagree with him. . . . What would you have in the headquarters office if their function was to solely process our papers and transmit them to the Commission? What sort of talent do you think we could attract? I think there's enough work for all of us -- I have no objection to the system as it now stands."

The Regional Offices

Each of the nine regional offices is divided into two divisions -- one for processing filings and conducting examinations, another for enforcement. Each regional office averages a staff of 59 enforcement attorneys and other professionals.

Significantly, each regional office also is autonomous, which means each considers itself more than just an appendage to the home office Enforcement Division. Over 75 percent of the Commission's enforcement actions emanate from the regional offices, with many of those handled from start to finish by the regional staffs.

"The regional offices are really the major enforcement arm of the Commission," says Boltz. At any given time, for example, the SEC's Los Angeles office usually has about

150 investigations underway. In that same period, the L.A. office might be litigating 20 to 30 civil injunctive actions, with some administrative proceedings also thrown into the mix.

At the start of fiscal 1975, the last year for which complete figures are available, the regional offices had 915 investigations pending. During that year, it opened 377 new investigations, and closed 273. That meant 1,019 were pending in the regionals at the start of fiscal 1976; an estimated 1,039 enforcement investigations currently are pending there.

In contrast, the home office Enforcement Division had 200 investigations pending at the start of fiscal 1975. It opened another 113 during that year, and closed 44. Thus, there were 269 investigations pending at headquarters at the start of fiscal 1976; an estimated 304 currently exist there.

In the home office Enforcement Division, four staff lawyers are assigned to a "regional office processing" branch whose sole purpose is to review enforcement work done in the regions. Every regional office enforcement proposal -- to begin an investigation or to file a complaint -- must first be cleared by headquarters before it reaches the Commission for disposition.

"We found you couldn't lump regional office work and home office work in the same branches," explains Associate Enforcement Director Wallace L. Timmeny. "The regional office work otherwise tends to be back burner." So several years ago, during a Division reorganization, Timmeny was given responsibility for overseeing regional office enforcement work.

"That was a very important move, because one of the things we have had to do is move fast with regional office matters. Those fellows have already completed their assignments out there, and they are sending it to the Commission. It's very disappointing to people to have a layer of review," Timmeny says.

A regional office enforcement recommendation goes first to the Division, which has the option of sending it on to the five-member Commission with a recommendation for approval, or back to the regional office with a request that it be modified. Typically, for example, the home office might propose deletion or addition of other respondents, or suggest that some of the charges be amended or dropped altogether.

The Division cannot disapprove the regional office recommendation -- only the Commission can do that -- but both groups say they make an effort to reach a consensus before presenting the Commission with an unresolved staff disagreement. Commission approval is necessary to obtain a formal order of investigation, to file civil and administrative actions, to make a criminal reference to the Justice Department, and to close an investigation.

If the regional office and the Enforcement Division cannot resolve their differences, both the regional recommendation and the conflicting Division dissent are sent to the Commission for a decision. "That's not an every day, common occurrence," explains Boltz, "but it does happen, and it is nothing we get excited about. The Division may know of a case that came out of the Chicago office that posed a problem, and for policy reasons it may be best not to attack that issue by bringing another case of that nature. Aside from that, I think it's healthy for an agency to have differing views."

The home office, obviously, is not similarly burdened by an extra layer of review when it proposes an enforcement action to the Commission. But regional administrators contacted by BNA insisted the multiple review of their cases is usually accomplished quickly, and generally doesn't cause friction.

"In the normal course of events, there are always complaints from the regional office to the home office," comments Milton V. Freeman, a well-known Washington, D.C. securities lawyer and veteran observer of the Commission. "When I was a young fellow, I opened the Denver regional office, the Seattle regional office, and the San Francisco regional office. There are always problems of communication. In more recent years, since I left, they have had regional administrators conferences. They try to coordinate. There is the normal tension for the guy out in the field who doesn't like somebody sitting back in the home office who doesn't know his neighborhood, doesn't know his people, and doesn't know the customs, telling him he is doing the wrong thing."

Headquarters

The headquarters Enforcement Division, on the other hand, is organized along functional lines, into three groups, one for investigations, one for trials, and the other for administrative matters. Each is a cluster of branches that is headed by an associate division director reporting directly to Sporkin.

Wallace L. Timmeny, 40, oversees seven branches within the Division of Enforcement. On Timmeny's staff there are 50 attorneys, 12 analysts (most are MBA's), five accountants, and three investigators. The group is responsible for enforcement proceedings gleaned from market surveillance -- including referrals from the states and self regulators. International aspects of the Commission's "questionable payments" and management fraud programs also fall under Timmeny's supervision, as well as enforcement programs directed at combating organized crime and abuses in municipal bond marketing. Criminal referrals to the Justice Department and processing of SEC Regional Office enforcement proceedings also are funneled through Timmeny's office.

Theodore Sonde, 37, heads the Enforcement Division's trial unit and chief counsel's office. Most of the attorneys under his supervision are drawn from private practice. Salaries are somewhat higher than the normal federal scale, and attorneys there work exclusively on major litigation. The trial section, currently staffed with ten attorneys and one paralegal assistant, handles major litigation such as the Commission's administrative action against Touche Ross & Co., and injunctive actions involving the National Student Marketing case, GeoTeck, and the Hughes Air West case. The Chief Counsel section, with five attorneys, handles specialized problems -- it reviews enforcement division policies, conducts specialized training programs, and coordinates both with the Commission's general counsel's office and with the regional offices.

Irwin M. Borowski, 41, oversees the four investigative units responsible for the Division's investment management and corporation finance enforcement programs. Borowski's staff, with 45 attorneys and seven accountants, spearheads the division's management fraud program and enforces the SEC's financial disclosure rules. His units also are involved in tax shelter and domestic commercial bribery investigations. Borowski is currently leading an investigation into the business practices of American life insurance companies.

Justice Department

Aside from the regional office and the home office, there's still a third partner in the enforcement process -- the Justice Department. By law, the SEC is permitted to file its own administrative and civil injunctive complaints. But when the Commission finds a case that warrants criminal action, it must forward the matter to Justice's Criminal Fraud Section, which then reviews the evidence and refers the case to the appropriate U.S. Attorney for prosecution. In 1976, (the latest year for which statistics are available), there were 116 such criminal referrals to Justice.

For some time, there has been speculation that the two agencies weren't getting along. Business Week recently reported, for example, that "the rivalry between the two groups is deep that they rarely cooperate, and the SEC has turned to consent settlements to fill the gap."

"Sheer nonsense," counters SEC's Timmeny.

It's true, in fact, that the SEC makes liberal use of consent settlements. Statistics on the number of consent agreements are unavailable, but one SEC official says they could run as high as 90 percent of the SEC's legal actions. Corporations, Sporkin says, knuckle under because they fear the SEC -- "they want to keep us from getting the goods."

Adds Sporkin: "If we are going to get 90, 95, 100 percent of what we are going to get after full litigation, I say, why not take a consent decree? And these are not slaps on the wrist. Where we don't get what we want, we do not settle."

Timmeny contends the SEC uses consent settlements because they represent the most cost-effective means of handling enforcement cases -- not, as Business Week reported, because the Division doesn't trust Justice.

"We don't hesitate to give Justice cases," comments Timmeny. "We think the criminal referral is a very important part of the enforcement program. It has been, historically."

"I'm not sure I could point to any area that currently exists that we could call a dispute," adds Mark M. Richard, chief of Justice's Fraud Section. "You're dealing with two groups of attorneys. Both are fairly aggressive, and both are dedicated to vigorous enforcement efforts in the white collar crime area -- a difficult area. Inherently, you're going to get a certain spirit of competitiveness. But, if it's present, it's a positive feature, rather than a negative one."

Richard was so concerned at one time about speculation that the two groups were feuding that he suggested to Sporkin that they hold a joint news conference as a demonstration of solidarity. "We really don't know how to account for the media's perception of the situation," he sighs.

But each of the nation's 94 U.S. Attorneys has the final say over whether to file a criminal securities action in his jurisdiction, and Richard concedes that the complexity of a criminal securities case can sometimes scare them off.

Former SEC Commissioner A.A. Sommer, Jr., now a private Washington, D.C. attorney, comments, "The Enforcement Division feels that in many cases, U.S. Attorneys in particular areas are reluctant to prosecute securities violations criminally because the cases are too complicated, they don't understand them, and they would take too much time. And I agree with [the Enforcement Division] on that. [U.S. Attorneys] would rather have nice, clean bank robbery cases. The relative non-use of criminal proceedings is one of the real shortcomings of securities law enforcement."

One SEC staff member, who declined to be quoted by name, criticized the Commission for preparing inadequate criminal cases. "We never give them enough [evidence]," he commented. "They have to develop things. Sometimes, the case isn't that good to begin with. They [U.S. Attorneys] have to completely reinvestigate a case to get evidence they can use criminally. So, in that sense, relations aren't that good."

Richard, on the other hand, says a special "securities unit" in his office has begun working more closely with SEC attorneys to help them develop the evidence necessary to win a solid criminal case. He also feels his office should be examining its overall securities prosecution strategy to see "whether the framing of charges will cut down the investigative

trial process. If you bring a case that's going to take eight months to try, you have a tremendous impact on the judicial system. You tie up your own manpower, and you create havoc in the judicial district by tying up a judge for that time. It's a tremendous burden on the defense as well. We're looking for ways to conserve courtroom time -- not just in SEC cases, but in all white collar crime cases."

To help improve the situation, the Justice Department's Fraud Section recently restructured its specialized securities unit so that the five-man unit now serves as a focal point for contact with the SEC regional offices, counseling them early in their investigations as to the criminal potential of a matter under scrutiny. The unit also uses its own attorneys to help U.S. Attorneys prosecute complex securities cases, and, in addition, has set up a task force to help the SEC develop criminal questionable payments cases. In that project, the Fraud Section has been assisted by two SEC attorneys designated as Special Assistant U.S. Attorneys.

"I'm not suggesting our unit is a substitute for SEC home office relations with their own regional offices," Richard explains, "but there must be a mechanism for providing entry by the regional offices into the Justice Department system. Otherwise, you're talking about establishing a very circuitous route -- a very cumbersome route on some very detailed questions. To channel that through the SEC home office, then to communicate to us, and then to go back through that system, certainly doesn't seem efficient."

SEC cases are not always referred to the Justice Department. Often, they simply filter slowly through the SEC bureaucracy and into the attention of the Fraud Section offices.

U.S. Attorneys get their criminal securities cases in several different ways. They can develop a case themselves, without SEC help (Richard says this is happening more frequently today); they can receive a formal criminal reference from the Commission; or they can request a case file directly from the SEC regional office already investigating it -- a short cut for U.S. Attorneys who know what the SEC office in their region is working on and want to avoid the time-consuming formal referral process from SEC headquarters.

"In many instances, the U.S. Attorney will request access to the files of the SEC even before there has been a contemplation of a referral," Richard explains. "There are also situations where the U.S. Attorney, because of the filing by the SEC of a civil action, will request access to the files. There are a variety of ways cases develop. . . . I don't want to mislead you. Of the total number of cases processed, I would say that maybe only half of them enter the system through that formal [referral] mechanism." In each case, including those in which a U.S. Attorney requests the SEC's investigative files, the Commission must approve the referral.

Initiation

If a corporation is the subject of a Commission investigation, chances are good that the case came to the SEC's attention in one of several ways -- from the mailbag, from the newspapers, or from another SEC division.

"Investor complaints is the primary route," explains the SEC's Timmeny. "We also review the newspapers every day, to see what the press has turned up. And we get referrals from other agencies -- state securities administrators, the Justice Department, the FBI.

"The mailbag is really a rich mine of cases, no question about it. You have to respond to the mailbag. That's what you're here for. The public is the one that's getting burned out there."

The Division uses a computer as an investigative aid. Each investigative subject's name is run through it to determine whether he has ever before been investigated or prose-

cuted on state or federal securities charges. One staff member who is familiar with the computer says it also contains the names of anyone who has written letters of complaint to the Commission or testified as a witness in a Commission investigation, a complete list of all registered securities representatives in the U.S., and the names of all persons who own five percent or more of a company's stock. "It's still primitive," the staff member adds. "A lot more use can be made of it."

Many of the SEC's high-visibility "questionable payments" and foreign payoffs cases have come from the agency's Division of Corporation Finance, which reviews registration statements and alerts the enforcement staff when a publicly-owned company discloses pay-offs. When a corporation comes to the SEC and voluntarily discloses its questionable payments (as 370 firms have already done), Enforcement Division personnel are always present to hear the confession and weigh the merits of further injunctive action. "Over the past years, the cooperation between the two divisions has never been better," says Timmeny. "They are a major source of referrals."

Investigations

SEC investigators, meanwhile, can be a major corporate headache. Although potential respondents in Commission actions are still searching for the cure, most private lawyers agree that full cooperation with the SEC is the best way to minimize pain and suffering. According to Washington, D.C. lawyer Arthur F. Mathews, prospective defendants can often use cooperation with the SEC to lay the foundation for a solid defense.

"The bar -- SEC specialists as well as non-specialists -- is falling down in representing clients during the investigatory stage," he complains. "One of the most important times to effectively represent somebody in SEC enforcement is before a proceeding is instituted. You can build your case. If you don't play surprises -- if you believe in advocating your defense, and in not keeping something undisclosed to spring it as a surprise in the courtroom -- then you have much more leeway in convincing the staff and the Commission as to what the appropriate remedy is."

"That's one of the few areas of the law where the defense counsel can have a strong role in fashioning which way the case will go. You may keep it from becoming a criminal prosecution and keep it in the civil context. If you represent a more peripheral person, and if you put the right record in the investigation, you may be able to convince the Commission or the staff not to name your client as a defendant. In most cases, the SEC can name many defendants. The crucial issue is, where do they draw the line? How many people will they name, and how many will get so-called free passes because they are too peripheral?"

Echoes SEC General Counsel Harvey L. Pitt: "My criticism has been primarily that too many lawyers in SEC matters have chosen not to cooperate. More of them should put mitigating evidence into the record. The best way to avoid problems is at the investigative stage."

Most corporations, adds Milton Freeman, feel they have no alternative but to cooperate when an SEC investigator knocks. "They cooperate. There are very few cases where you can do anything else."

Fifth Amendment

"Taking the Fifth" is one obvious alternative for a corporate officer facing an SEC investigation. But an officer often is reluctant to invoke his constitutional right against self-incrimination, attorneys contend, fearing adverse publicity.

"Business people believe the Fifth Amendment was developed solely for the protection of Mafia chieftains," New York attorney Charles Stillman recently told a group of corporate

counsel. "They think, 'It will look like I'm guilty.'" Stillman counsels: If a prosecutor believes an executive has violated the law, "You may have no alternative but to advise your client to assert his Fifth Amendment privilege."

Hofstra University Law School dean Monroe Freedman, a civil libertarian who had looked into SEC investigative abuses several years ago found justification for corporate misgivings about asserting privilege: "An attorney who requests necessary time to prepare a defense, or who invokes the attorney-client privilege, may be asked rhetorically, 'Are you saying your client won't cooperate?' In one case, when the attorney indicated that his client intended to invoke his constitutional privilege against self-incrimination, he was advised by the SEC staff member, 'That's the best way to guarantee an indictment.'"

At a recent symposium on government investigations, a veteran SEC investigator candidly told corporate counsel to "cooperate fully, or you're better off stonewalling it." 373
SRLR A-1

Robert G. Ryan, head of the SEC's Criminal Reference Branch, also told the corporate counsel to be candid in their dealings with the SEC; anticipate SEC investigations; and "get to me [with information] before I get to you."

Ray Garrett, a former SEC chairman (now a Chicago attorney) who placed himself under investigation by the Enforcement Division staff while he was a sitting commissioner, has similar advice.

"Do one or the other," he contends. "Either cooperate fully, or tell them to go to hell." An executive or professional involved with a publicly-owned company is under more pressure to cooperate, and to sign a consent injunction, Garrett adds. "You sometimes find it necessary to cooperate for the welfare of the corporation."

Pressure to Settle

Once an investigation has commenced, there can be strong pressures on a corporation to settle quickly, thereby minimizing bad publicity, legal fees, and exposure to costly private lawsuits.

"The expenses are not just the out-of-pocket costs of attorneys' fees and witness fees," Garrett comments. "The expense within the corporation that's hard to quantify can also be the most severe -- the investigation itself is traumatic. It gets everybody upset." There can be months or years of pre-trial testimony and depositions, and the corporate notoriety brought on by a lively trial is something any corporation is at pains to avoid.

If the investigation involves adequacy of disclosure, there can be still other problems facing a corporation that doesn't want to talk settlement with the SEC -- new securities offerings can be held up by the Corporation Finance Division. Recently, for example, a five-million-share General Telephone & Electronics common stock offering worth \$154 million was held up because the Corporation Finance Division insisted GT & E had not disclosed enough about its questionable payments.

"This gives the SEC, in a sense, an unfair weapon," says Garrett. "A corporation may need public financing -- it may have an important merger or acquisition coming up that requires a filing -- and what kind of accelerated treatment are you going to get from Corporation Finance if you are litigating the adequacy of your prior disclosures?"

There can be added advantages to cooperation. Defense counsel who are cooperating closely with the SEC to get a favorable settlement for their clients have been permitted in the past to write the Commission's complaint, and the consent decree that is filed along with it. In one case, the defense typed the final version of each. "Often, when you're bargaining with

the SEC, you will exchange drafts back and forth until you reach agreement," says an experienced Washington, D.C. defense attorney. "I've been in cases where I've typed up the complaint myself and then given it back to the SEC to review. 'This is what I think is fair,' I will say. It's not unusual at all. Happens all the time."

One lawyer who disputes the SEC's plea for cooperation is August Bequai, a former SEC attorney currently practicing law in Washington, D.C. "We have heard nonsense" about cooperation, he says. "Don't go in and cry your heart out. The truth of the matter is, prosecutor want to have it easy . . . The SEC made their [questionable] payments cases by sending letter to people, asking whether the company had ever made a payoff. That's ridiculous. There are serious Fifth Amendment problems of self-incrimination . . . You don't really have to come in. You don't have to cry your heart out. You're dealing with a lot of agencies that can trip over their own feet -- so, help them trip."

Bequai, who spent more than two-and-one-half years at the SEC, claims lawyers are too quick to cooperate in an investigation, especially when the Commission staff has little evidence to confirm its suspicions.

"We would ask an attorney to bring his client down for questioning," Bequai says of his SEC days, "and the attorney never once asked, 'Wait a minute, do you have a subpoena? Is there a formal investigation?' (As you know, to have a formal investigation, you have to have a formal order approved by the Commission.) And he never asked once; he just brought his client down, and the client shot his mouth off. And a lot of times, a fellow would give you the facts that you really didn't have, and you made a case against him. . .

"The question is, why do the attorneys go down? They go down because they generate fees. You go down -- you create work. When I worked at the Commission, I had some outside members of the bar tell me that, in so many words. . . I think it is unethical to generate unnecessary work for your client, even though your client may be affluent. If you want redistribution of wealth, there are other ways of doing it."

Bequai is not the only lawyer who raises questions about the SEC enforcement process. Next week, BNA takes a closer look at the private bar's complaints about the SEC.

-- End of Section AA --