

NEWS

SECURITIES AND EXCHANGE COMMISSION

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REMARKS TO
DISTRICT OF COLUMBIA CHAPTER
AMERICAN SOCIETY OF WOMEN ACCOUNTANTS
TWENTY-NINTH ANNUAL BANQUET
BOLLING AIR FORCE BASE
WASHINGTON, D.C.
NOVEMBER 7, 1979

"THE NEED FOR NEXUS IN THE
DISCIPLINING OF ACCOUNTANTS"

BY
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I WOULD LIKE TO BEGIN THIS TALK BY ISSUING A DISCLAIMER: I AM NOT AN ACCOUNTANT, I AM NOT ALWAYS ABLE TO FOLLOW THE INTRICACIES OF CURRENT DEBATES IN YOUR FIELD, EVEN WHEN SUCH DEBATES HAVE BEEN INITIATED BY THE SEC, AND I RECOGNIZE THAT WE LAWYERS MUST OFTEN DEFER TO YOUR JUDGMENTS WHEN IT COMES TO PROPER AUDITING PROCEDURES OR THE FORMULATION OF GENERALLY ACCEPTED ACCOUNTING PRINCIPLES. NEVERTHELESS, I AM A COMMISSIONER OF A FEDERAL AGENCY WHICH REGULATES THE ACCOUNTING PROFESSION, AND SO FROM TIME TO TIME I FEEL OBLIGED TO DISCUSS SOME OF MY CONCERNS AS A LAWYER AND A FEDERAL OFFICIAL INVOLVED IN THE ADMINISTRATION OF THE SECURITIES LAWS, ABOUT THE PROCESS BY WHICH SEC OVERSIGHT OF YOUR PROFESSION IS EXERCISED.

IN ITS JULY 1979 REPORT TO CONGRESS ON THE ACCOUNTING PROFESSION THE COMMISSION STATED THAT IT

... CONTINUES TO BELIEVE THAT THE INDEPENDENCE AND PROFESSIONALISM OF ACCOUNTANTS ARE CRITICAL TO THE CREDIBILITY AND USEFULNESS OF THEIR REPORTS. FURTHER, THE COMMISSION CONTINUES TO BELIEVE THAT THE INITIATIVE FOR ESTABLISHING AND IMPROVING ACCOUNTING AND AUDITING STANDARDS SHOULD REMAIN IN THE PRIVATE SECTOR, SUBJECT TO SEC OVERSIGHT. 1/

1/ SEC REPORT TO CONGRESS ON THE ACCOUNTING PROFESSION AND THE COMMISSION'S OVERSIGHT ROLE, 96TH CONG., 1ST SESS., SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS (JULY 1979), P. 8.

TONIGHT I AM GOING TO SPEAK TO YOU ABOUT THE COMMISSION'S AUTHORITY TO ENFORCE ITS IDEAS CONCERNING THE INDEPENDENCE AND PROFESSIONALISM OF ACCOUNTANTS THROUGH THE USE OF ADMINISTRATIVE DISCIPLINARY PROCEEDINGS. AS MANY OF YOU KNOW, SEC. DISCIPLINARY PROCEEDINGS AGAINST ACCOUNTANTS ARE PROSECUTED PURSUANT TO RULE 2(E) OF THE COMMISSION'S RULES OF PRACTICE.

THAT RULE PURPORTS TO GIVE THE COMMISSION AUTHORITY TO DISCIPLINE AND SANCTION "ANY PERSON" INCLUDING AN ACCOUNTANT, BY MEANS OF A SUSPENSION OR A PERMANENT BAR FROM PRACTICING BEFORE THE COMMISSION, WHO IS FOUND:

(I) NOT TO POSSESS THE REQUISITE QUALIFICATIONS TO REPRESENT OTHERS, OR (II) TO BE LACKING IN CHARACTER OR INTEGRITY OR TO HAVE ENGAGED IN UNETHICAL OR IMPROPER PROFESSIONAL CONDUCT, OR (III) TO HAVE WILLFULLY VIOLATED, OR WILLFULLY AIDED AND ABETTED THE VIOLATION OF ANY PROVISION OF THE FEDERAL SECURITIES LAWS, OR THE RULES AND REGULATIONS THEREUNDER. 2/

THESE ARE VERY GENERAL STANDARDS. SOME ARE ETHICAL, SUCH AS INTEGRITY, CHARACTER AND THE QUALIFICATIONS TO REPRESENT OTHERS. SOME RELATE TO COMPETENCE, SUCH AS IMPROPER PROFESSIONAL CONDUCT. SOME ARE LEGAL, SUCH AS WILLFUL VIOLATION OF THE FEDERAL SECURITIES LAWS. FURTHER, THE RULE DOES NOT DISTINGUISH BETWEEN THE USE OF RULE 2(E) TO DISCIPLINE ACCOUNTANTS, ATTORNEYS, OR ANY OTHER PROFESSIONALS.

BEFORE I BECAME A COMMISSIONER, AND DURING MY TENURE IN OFFICE, I HAVE EXPRESSED MY CONCERNS ABOUT THE COMMISSION'S USE OF RULE 2(E) AS A GENERAL ENFORCEMENT TOOL TO DISCIPLINE ATTORNEYS. ^{3/} SOME OF THOSE SAME QUESTIONS AS TO THE COMMISSION'S LEGAL AUTHORITY TO PROMULGATE RULE 2(E) AND THE APPROPRIATENESS AS A POLICY MATTER OF PROFESSIONAL DISCIPLINARY POWER IN A PROSECUTORIAL AGENCY, ARE APPLICABLE TO ACCOUNTANTS AS WELL AS ATTORNEYS. HOWEVER, I BELIEVE THAT THE COMMISSION DOES HAVE A STRONGER BASIS FOR ASSERTING ADMINISTRATIVE JURISDICTION TO DISCIPLINE ACCOUNTANTS THAN LAWYERS. NEVERTHELESS, SINCE THIS POWER IS NOT EXPRESS, IT MUST BE IMPLIED IF IT IS TO BE FOUND AT ALL. ACCORDINGLY, I BELIEVE SUCH A DISCIPLINARY POWER SHOULD BE NARROWLY CONSTRUED AND SHOULD BE EXERCISED ONLY WHERE IMPROPER CONDUCT DIRECTLY INTERFERES WITH THE COMMISSION'S ADMINISTRATION OF SPECIFICALLY GRANTED EXPRESS AUTHORITY.

I START MY ANALYSIS WITH THE LAWS WHICH ARE THE BASIC ENABLING STATUTES FOR THE REGULATORY WORK AT THE SEC AND TO WHICH ANY COURT MUST REFER IN DETERMINING THE EXISTENCE AND EXTENT OF THE COMMISSION'S AUTHORITY. YOU WILL FIND

^{3/} SEE, IN THE MATTER OF KEATING, MUETHING & KLEKAMP (DISSSENT), SECURITIES EXCHANGE ACT RELEASE No. 15982 (JULY 2, 1979); DALEY & KARMEL, "ATTORNEYS' RESPONSIBILITIES: ADVERSARIES AT THE BAR OF THE SEC," 24 EMORY LAW JOURNAL 747 (SUMMER, 1975).

NO PROVISION IN ANY OF THE FEDERAL SECURITIES LAWS EXPRESSLY CONFERRING ON THE COMMISSION THE AUTHORITY TO DISCIPLINE ACCOUNTANTS ADMINISTRATIVELY. WHATEVER AUTHORITY DOES EXIST SIMPLY DERIVES BY IMPLICATION FROM THE GENERAL POWERS GIVEN TO THE COMMISSION TO MAKE SUCH RULES AS MAY BE "NECESSARY" OR "APPROPRIATE" TO IMPLEMENT THE EXPRESS PROVISIONS OF THE SECURITIES LAWS. ^{4/} FURTHERMORE, THE EXPRESS PROVISIONS DEALING WITH ACCOUNTING, AUDITING, OR ACCOUNTANTS IN THE SECURITIES LAWS ARE AT BEST AMBIGUOUS WITH RESPECT TO THE ISSUE OF PROFESSIONAL DISCIPLINARY AUTHORITY.

THE ONLY EXPRESS PROVISIONS OF THE SECURITIES LAWS CONCERNING ACCOUNTING, THAT IS THE BODY OF PRINCIPLES AND STANDARDS BY WHICH FINANCIAL INFORMATION IS PRESENTED, ARE THOSE, SUCH AS SECTION 19(A) OF THE SECURITIES ACT OF 1933, WHICH GIVE THE COMMISSION THE AUTHORITY TO DEFINE "ACCOUNTING, TECHNICAL, AND TRADE TERMS" AND TO "PRESCRIBE THE FORM ... IN WHICH REQUIRED INFORMATION SHALL BE SET FORTH, THE ITEMS ... TO BE SHOWN IN THE BALANCE SHEET AND EARNING STATEMENT, AND THE METHODS TO BE FOLLOWED IN THE PREPARATION OF ACCOUNTS. ..."

PURSUANT TO THIS AUTHORITY, THE COMMISSION HAS ADOPTED SEVERAL REGULATIONS, INCLUDING REGULATION S-X, WHICH HAS SET FORTH DETAILED RULES DEFINING ACCOUNTING

^{4/} E.g., SECTION 23(A) OF THE SECURITIES EXCHANGE ACT OF 1934.

TERMS AND PRESCRIBING METHODS OF PRESENTATION OF FINANCIAL INFORMATION TO BE FILED WITH THE COMMISSION. TO A LARGE EXTENT THE COMMISSION HAS ALSO DISCHARGED ITS RESPONSIBILITY IN THIS AREA BY LOOKING TO THE PRIVATE SECTOR AND ITS STANDARD SETTING BODIES TO SUPPLEMENT ITS EFFORTS. THE FINANCIAL ACCOUNTING STANDARDS BOARD ("FASB") IS THE CURRENT BODY TO WHICH SUCH PRIVATE SECTOR RESPONSIBILITY IS GIVEN FOR ESTABLISHING ACCOUNTING STANDARDS AND POLICIES.

THIS WAS ACCOMPLISHED IN ACCOUNTING SERIES RELEASE No. 4 WHICH STATES THE COMMISSION'S POLICY THAT FINANCIAL STATEMENTS PREPARED IN ACCORDANCE WITH ACCOUNTING PRACTICES FOR WHICH THERE WAS NO SUBSTANTIAL AUTHORITATIVE SUPPORT WERE PRESUMED TO BE MISLEADING. PURSUANT TO THAT RELEASE ISSUED IN 1938 AND A SECOND ONE ISSUED IN 1973, 5/ THE COMMISSION HAS STATED THAT THE PRINCIPLES AND STANDARDS OF FASB'S PREDECESSOR, AND NOW THE FASB, ARE CONSIDERED BY THE COMMISSION AS HAVING SUBSTANTIAL AUTHORITATIVE SUPPORT. PRINCIPLES AND STANDARDS CONTRARY TO FASB PROMULGATIONS ARE CONSIDERED TO HAVE NO SUCH SUPPORT.

A RECENT LEGAL CHALLENGE WAS MADE TO THE COMMISSION'S POLICY OF RELYING ON THE FASB, BUT IT WAS

5/ ACCOUNTING SERIES RELEASE No. 150 (DECEMBER 20, 1973).

UNSUCCESSFUL. 6/ DIFFERENCES OF OPINION AS TO INFLATION ACCOUNTING, OIL AND GAS ACCOUNTING, AND OTHER SPECIFIC SUBJECTS HAVE GENERATED DEBATE. BUT, BY AND LARGE, THE COMMISSION'S AUTHORITY TO FORMULATE ACCOUNTING STANDARDS IS CLEARLY ESTABLISHED IN ITS ENABLING STATUTES AND THIS AUTHORITY HAS BEEN IMPLEMENTED WITH A MINIMUM OF CONTROVERSY.

THE EXISTENCE AND EXTENT OF THE COMMISSION'S AUTHORITY OVER AUDITING, THAT IS, THE BODY OF PROCEDURES AND TECHNIQUES BY WHICH FINANCIAL RECORDS ARE EXAMINED AND TESTED FOR RELIABILITY, IS MORE CONTROVERSIAL. THERE IS NO EXPRESS PROVISION IN THE STATUTES GIVING THE COMMISSION SUCH POWER. YET, THE COMMISSION OVER THE YEARS HAS DISCIPLINED ACCOUNTANTS FOR AUDITING WHICH IT VIEWS AS DEFECTIVE AS MEASURED BY THE PROFESSIONAL AUDITING STANDARDS PROMULGATED BY THE AUDITING STANDARDS BOARD OF THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS ("AICPA"), AND, SEC INJUNCTIVE ACTIONS AND RULE 2(E) PROCEEDINGS AGAINST ACCOUNTANTS HAVE BEEN BASED PRIMARILY UPON CHARGES OF DEFECTIVE AUDITING.

WHETHER OR NOT THE COMMISSION CAN DISCIPLINE AN ACCOUNTANT FOR DEFECTIVE AUDITING, WHEN THERE IS NO EXPRESS PROVISION OF LAW GIVING IT AUTHORITY OVER AUDITING STANDARDS OR PROCEDURES, IS A VERY REAL ISSUE WHICH DESERVES ATTENTION. WHEN THE SECURITIES

6/ ARTHUR ANDERSEN & Co. v. SEC, 776-777 CCH FED. SEC. L. REP. PAR. 95,720 (N.D. ILL. 1976); SEE ALSO 719787 CCH FED. SEC. L. REP. PAR. 96,374 (N.D. ILL. 1978).

ACT OF 1933 WAS BEING DEBATED CERTAIN CONGRESSMEN PROPOSED THAT A CORPS OF GOVERNMENT AUDITORS BE ESTABLISHED TO AUDIT PUBLIC COMPANIES. THIS PROPOSAL WAS REJECTED IN FAVOR OF RELIANCE ON THE PRIVATE SECTOR FOR THIS RESPONSIBILITY. Z/ THE LEGISLATIVE HISTORY OF THE SECURITIES LAWS THUS LENDS SOME SUPPORT TO THE EXERCISE OF COMMISSION POWER OVER AUDITING STANDARDS.

BY CONTRAST, CONGRESS NEVER DEBATED OR CONTEMPLATED GIVING THE SEC THE RESPONSIBILITY FOR REGULATING THE PRACTICE OF LAW. AN ATTORNEY ACTS AS AGENT AND ADVOCATE, AND THE ATTORNEY-CLIENT RELATIONSHIP IS TO SOME EXTENT CONSTITUTIONALLY PROTECTED BY THE SIXTH AMENDMENT. AN ACCOUNTANT, HOWEVER, MUST BE INDEPENDENT OF HIS CLIENT, AND AN ACCOUNTANT WHO CERTIFIES FINANCIAL STATEMENTS CONTEMPLATES THAT THIRD PARTIES WILL RELY UPON THE PROFESSIONAL EXERCISE OF THAT INDEPENDENT JUDGMENT. WHILE I COULD ELABORATE FURTHER ON THE DISTINCTIONS BETWEEN LAWYERS AND ACCOUNTANTS, THAT IS A TOPIC FOR ANOTHER OCCASION. I MENTION THESE DIFFERENCES NOW ONLY BECAUSE THE SEC HAS USED RULE 2(E) TO DISCIPLINE BOTH PROFESSIONS.

THE ONLY LAWS THAT GRANT INDIVIDUAL ACCOUNTANTS THE AUTHORITY TO PRACTICE ARE THOSE OF THE STATES IN WHICH THEY ARE LICENSED. THERE IS NO FEDERAL LICENSING OF ACCOUNTANTS.

Z/ SEE, HEARINGS ON S.875, SENATE COMMITTEE ON BANKING AND CURRENCY, 73RD CONG., 1ST SESS., 55-63 (1933).

IN FACT, FEDERAL LAW PROHIBITS THE SEC AND OTHER FEDERAL AGENCIES FROM SETTING ADMISSION OR COMPETENCY STANDARDS FOR ACCOUNTANTS. ^{8/} THE ONLY EXPRESS PROVISIONS OF THE FEDERAL SECURITIES LAWS THAT REFER TO ACCOUNTANTS ARE THOSE WHICH REQUIRE THAT FINANCIAL STATEMENTS FILED WITH THE COMMISSION BE CERTIFIED BY AN INDEPENDENT PUBLIC OR CERTIFIED ACCOUNTANT. ^{9/}

THESE ARE ALL OF THE EXPRESS PROVISIONS OF THE FEDERAL SECURITIES LAWS THAT DEAL WITH ACCOUNTING AND ACCOUNTANTS. YOU WILL NOTE THAT THEY EITHER GIVE THE COMMISSION THE POWER TO DEFINE ACCOUNTING TERMS, PRESCRIBE THE PRESENTATION OF FINANCIAL INFORMATION, OR REQUIRE THAT FINANCIAL STATEMENTS FILED WITH THE COMMISSION BE CERTIFIED BY AN INDEPENDENT PUBLIC OR CERTIFIED ACCOUNTANT. DISCIPLINING OR SANCTIONING ACCOUNTANTS IS NOT REFERRED TO IN THOSE LAWS. THE COMMISSION'S ADOPTION AND UTILIZATION OF RULE 2(E), THEREFORE, MUST BE SUSTAINED, IF IT IS SUSTAINABLE, ON THE THEORY THAT THE SEC HAS IMPLIED AUTHORITY TO PROCEED AGAINST ACCOUNTANTS ADMINISTRATIVELY AS A NECESSARY AND APPROPRIATE COROLLARY TO THE EXPRESS STATUTORY PROVISIONS TO WHICH I HAVE REFERRED.

MY PERSONAL VIEW IS THAT USING THIS IMPLIED AUTHORITY TO DISCIPLINE ACCOUNTANTS BY AN ADMINISTRATIVE PROCEEDING IS AT BEST A BARELY SUFFICIENT LEGAL BASIS FOR RULE 2(E),

^{8/} 5 U.S.C. SECT. 500(B).

^{9/} E.G. ITEMS 25, 26 AND 27 TO SCHEDULE A OF THE SECURITIES ACT OF 1933.

AT LEAST AS IT IS NOW DRAFTED. I SHOULD NOTE THAT THE SECOND CIRCUIT RECENTLY UPHELD THIS AUTHORITY, 10/ BUT IT REMAINS TO BE SEEN WHETHER THE SUPREME COURT WILL IMPLY SUCH A BROAD ADMINISTRATIVE POWER TO DISCIPLINE FROM A POWER TO DEFINE ACCOUNTING TERMS AND REGULATE INDEPENDENCE.

ANY USE OF THIS AUTHORITY, IN ANY EVENT, OUGHT TO BE STRICTLY CONFINED TO THE REGULATION OF FINANCIAL PRESENTATION OR INDEPENDENCE REQUIREMENTS. AND IF THE COMMISSION IS GOING TO EXERCISE GENERAL DISCIPLINARY AUTHORITY OVER ACCOUNTANTS IT OUGHT TO AT LEAST CONCEDE OR SPECIFY THE PARAMETERS OF ITS AUTHORITY AND ARTICULATE THE STANDARDS IT IS USING IN APPLYING RULE 2(E), SOMETHING IT HAS NEVER DONE. TO THE CONTRARY, THE COMMISSION HAS TAKEN THE POSITION THAT ITS RULE 2(E) AUTHORITY IS NOT OPEN TO QUESTION. 11/ FURTHERMORE, RULE 2(E) PROCEEDINGS HAVE BECOME PART OF THE STANDARD ENFORCEMENT ARSENAL BY WHICH THE SEC DISCHARGES ITS RESPONSIBILITIES.

INSTEAD OF HAVING DEFINED, LIMITED AND ARTICULATED STANDARDS, RULE 2(E), AS NOW DRAFTED AND APPLIED, REFERS TO LOFTY AND GENERAL CONCEPTS OF INTEGRITY, CHARACTER, AND QUALIFICATIONS TO REPRESENT OTHERS. INSTEAD OF

10/ TOUCHE ROSS & CO., V. SEC, /CURRENT/ CCH FED. SEC. L. REP. PAR. 96,854 (2D CIR. MAY 10, 1979).

11/ SEE, E.G., BRIEFS FOR THE COMMISSION IN TOUCHE ROSS & CO. V. SEC, SUPRA.

SPECIFYING WHAT ACTS ARE ILLEGAL, RULE 2(E) REFERS TO IMPROPER PROFESSIONAL CONDUCT, A RATHER VAGUE AND LOOSE GENERAL CONCEPT.

OF COURSE, ETHICS AND CHARACTER MIGHT HAVE A BEARING ON AN ACCOUNTANT'S INDEPENDENCE, WHICH IS A STATUTORY REQUIREMENT. BUT CONSIDERATIONS OF ETHICS AND CHARACTER NEED NOT NECESSARILY BEAR ON INDEPENDENCE. AND EVEN IF THEY DO, APPLICATION OF THE COMMISSION'S LIMITED AUTHORITY TO DISCIPLINE ACCOUNTANTS CONCERNING LACK OF INDEPENDENCE OUGHT NOT TO REST SOLELY ON SUCH GENERAL AND AMORPHOUS STANDARDS AS INTEGRITY, ETHICS OR THE QUALIFICATIONS TO REPRESENT OTHERS.

AN INHERENT WEAKNESS OF ANY IMPLIED POWER, AND ESPECIALLY A POWER TO DISCIPLINE, IS THE LACK OF DEFINED STANDARDS. WHEN THE GOVERNMENT ACTS WITHOUT REFERENCE TO A REGULATORY STANDARD WHICH CIRCUMSCRIBES SUCH ACTION, THERE IS ALWAYS THE DANGER THAT SUCH ACTION WILL BE ARBITRARY OR CAPRICIOUS. WHILE THERE IS A TENDENCY TO RELY ON THE COURTS TO CURB EXCESSIVE ACTION BY GOVERNMENT AGENCIES, I BELIEVE THAT REGULATORS LIKE ME SHOULD TAKE THE INITIATIVE IN ARTICULATING STANDARDS AND IN EXERCISING SELF-RESTRAINT.

THIS LEADS ME TO MY THESIS FOR THIS EVENING, WHICH IS THAT THE COMMISSION SHOULD DISCIPLINE AN ACCOUNTANT ONLY WHERE THERE IS A CLEAR AND DIRECT LINK -- WHAT I CALL A NEXUS - BETWEEN THE ACCOUNTANT'S CONDUCT AND THE COMMISSION'S EXPRESS AUTHORITY AND ITS EXPRESS REGULATORY PROCESSES. THE COMMISSION SHOULD NOT BE USING RULE 2(E) AS A GENERAL ENFORCEMENT TOOL AGAINST INCOMPETENT OR UNETHICAL AUDITORS.

FOR EXAMPLE, IN A CASE INVOLVING AN OFFERING OF SECURITIES BY USE OF FALSE FINANCIAL INFORMATION, AN ACCOUNTANT OUGHT TO BE SUBJECTED TO COMMISSION DISCIPLINE UNDER RULE 2(E) ONLY WHERE HIS CONDUCT RESULTED IN A CERTIFICATION BY HIM OF FALSE INFORMATION WHICH WAS FILED WITH THE COMMISSION. IF NO CERTIFICATION WAS MADE OR NO FILING MADE WITH THE COMMISSION, THE ACCOUNTANT MIGHT STILL BE LIABLE UNDER THE SECURITIES LAWS IN AN INJUNCTIVE PROCEEDING BROUGHT BY THE COMMISSION IN COURT FOR ASSISTING IN FRAUDULENT ACTIVITIES. OR HE MIGHT BE LIABLE TO A PRIVATE INVESTOR OR CREDITOR FOR FRAUD. BUT HE SHOULD NOT BE DISCIPLINED ADMINISTRATIVELY BY THE COMMISSION.

SINCE RULE 2(E) OR ITS ANTECEDENT HAS BEEN IN EFFECT SINCE 1935, YOU MAY WONDER WHY I AM RAISING QUESTIONS AS TO ITS VALIDITY AND THE PROPRIETY OF ITS APPLICATION.

TO SOME EXTENT IT IS BECAUSE OVER THE PAST DECADE I HAVE OBSERVED THE INCREASING FREQUENCY OF ITS USE AND THE SWEEPING MANNER OF ITS APPLICATION TO BOTH ATTORNEYS AND ACCOUNTANTS. TO MY MIND, THE COMMISSION HAS CONFOUNDED THE VERY REAL PROBLEMS INVOLVED BY DISCIPLINING THESE TWO DISPARATE PROFESSIONS UNDER A SINGLE BROAD RULE.

IN ADDITION, I RAISE THESE QUESTIONS BECAUSE I BELIEVE THAT THE EXERCISE OF GOVERNMENTAL POWER SHOULD BE RESTRAINED AND CIRCUMSCRIBED BY STATUTES ENACTED BY THE CONGRESS, WHICH IS DEMOCRATICALLY ELECTED. I WORRY WHEN A NON-ELECTED BODY, ACTING IN GOOD FAITH BUT NEVERTHELESS ONLY ACCORDING TO ITS "FAITH" -- WHICH NOT EVERYONE SHARES -- ADOPTS PROCEDURES ON ITS OWN, TO IMPLEMENT VAGUE IDEALS AND CONCEPTS BY SANCTIONING PROFESSIONALS WHOSE VERY LIVELIHOOD RESTS ON THEIR REPUTATIONS. I HAVE DIFFICULTY RECONCILING SUCH ILL-DEFINED AND SUBJECTIVE POLICY WITH THE NOTION THAT PROSECUTORIAL AGENCIES MUST OPERATE WITHIN DEFINED PARAMETERS OF LAW.

IN RECENT YEARS, THE MANNER AND EXTENT TO WHICH THE FEDERAL GOVERNMENT SHOULD REGULATE AND DISCIPLINE ACCOUNTANTS, AND THE MECHANISMS FOR THE PROFESSION'S SELF-REGULATION, HAVE BEEN QUESTIONED IN THE COURTS, BY THE CONGRESS AND AT THE SEC. AT A TIME WHEN THE PUBLIC GENERALLY HAS BEEN

QUESTIONING THE VALIDITY OF INCREASED GOVERNMENTAL REGULATION, THE COMMISSION HAS BEEN URGING THAT THE ACCOUNTING PROFESSION EXPERIMENT WITH SELF-REGULATION SUBJECT TO SEC OVERSIGHT. BUT AS A FOUNDATION FOR THE FUTURE RELATIONSHIP BETWEEN THE COMMISSION AND THE PROFESSION IS LAID, IT IS IMPORTANT THAT WHATEVER OVERSIGHT THE COMMISSION EXERCISES OVER DISCIPLINE BE ON FIRM LEGAL GROUND. IF THE COMMISSION'S AUTHORITY TO ACT IS NOT CLEAR, ITS REGULATION IS UNLIKELY TO BE EFFECTIVE. BECAUSE THE COMMISSION'S RELIANCE ON AN IMPLIED POWER IS SO EQUIVOCAL, IT IS DIFFICULT FOR ITS PROFESSIONAL RESPONSIBILITY PROGRAM TO BE COHERENT IN EITHER OBJECTIVES OR IMPLEMENTATION UNDER RULE 2(E) AS NOW DRAFTED.

MY PERSONAL OPINION IS THAT SELF-REGULATION HAS PROVEN A GOOD ALTERNATIVE TO GOVERNMENT REGULATION IN MANY AREAS UNDER THE FEDERAL SECURITIES LAWS. ACCORDINGLY, I CONCUR IN THE ENCOURAGEMENT THE COMMISSION HAS BEEN GIVING TO THE EFFORTS OF THE AICPA, AND OTHER BODIES TO ESTABLISH BETTER MECHANISMS FOR THE DISCIPLINING OF ACCOUNTANTS.

IN ORDER FOR SUCH DISCIPLINARY MECHANISMS TO BE BOTH FAIR AND EFFECTIVE, THE COMMISSION MUST EXERCISE MEANINGFUL OVERSIGHT OVER THE ACCOUNTING PROFESSION. BUT THE COMMISSION'S GENERAL RULEMAKING AUTHORITY IS A WEAK REED UPON WHICH TO LEAN AN ELABORATE AND IMPORTANT REGULATORY PROGRAM. THIS

LEAVES THE COMMISSION VULNERABLE TO CHARGES OF OVERREACHING ITS AUTHORITY ON THE ONE HAND, AND INEFFECTIVELY EXERCISING ITS MANDATE ON THE OTHER HAND. IT SEEMS TO ME THAT ULTIMATELY EXPRESS STATUTORY AUTHORITY FOR DISCIPLINING ACCOUNTANTS WILL HAVE TO BE GIVEN TO THE COMMISSION IN ORDER FOR SELF-REGULATION TO BECOME FULLY EFFECTIVE AND TO ENJOY THE CONFIDENCE OF THE ENTIRE PROFESSION AND THE PUBLIC.

THE COMMISSION'S USE OF RULE 2(E) TO DISCIPLINE BOTH ATTORNEYS AND ACCOUNTANTS HAS RESULTED IN CONFUSION AND CONTROVERSY OVER THE AGENCY'S LEGAL AUTHORITY AND POLICY OBJECTIVES. MY PERSONAL VIEW IS THAT THE COMMISSION'S QUESTIONABLE EFFORTS TO REGULATE LAWYERS IN THE SAME WAY AND TO THE SAME EXTENT AS ACCOUNTANTS HAVE UNDERMINED THE LEGITIMACY OF ITS AUTHORITY TO REGULATE THE ACCOUNTING PROFESSION. THE TIME HAS COME FOR THE SEC CLEARLY TO ARTICULATE THE OBJECTIVES OF ITS PROFESSIONAL RESPONSIBILITY PROGRAMS, TO SEPARATE THE DISCIPLINING OF ACCOUNTANTS FROM THE DISCIPLINING OF ATTORNEYS, TO RECOGNIZE AND TO ADMIT TO LIMITATIONS ON ITS AUTHORITY TO DISCIPLINE PROFESSIONALS, AND TO REQUEST FROM THE CONGRESS WHATEVER CLARIFYING LEGISLATION IS REQUIRED TO MAKE THAT AUTHORITY EXPRESS.