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SEC Debarment of Officers and Directors After Sarbanes-Oxley

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Corporate misdeeds will be found and will be punished . . . . The SEC will now have the administrative authority to bar dishonest directors and officers from ever again serving in positions of corporate responsibility . . . . Corporate crime will no longer pay.

President George W. Bush

Beginning in the spring of 2002, the Securities and Exchange Commission (the “Commission”) set out to acquire the power to suspend or bar individuals from serving as an officer or director of a public company. The Commission had long enjoyed the administrative power to suspend or bar brokers, investment advisers, and investment company managers. Since 1990, it had also had the power to seek a court order suspending or barring securities law violators from serving as a public company officer or director.

In the Commission’s view, several changes in the existing regime seemed necessary. First, the Commission wanted to modify the standard applied by federal courts when considering requests for suspension or bar orders. Second, and perhaps more importantly, it wanted to eliminate the need to go to court in order to secure a suspension or bar order against securities law violators.

With the passage of the Sarbanes-Oxley Act (the “Act” or “Sarbanes-Oxley”) in July 2002, the Commission has apparently seen its dreams (on this issue) come true. First, the Sarbanes-Oxley Act now provides that, in order for a federal district court to enter a suspension or bar order, it need only find that the defendant before it is “unfit.” This standard is a change from the prior formulation, which

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2. See infra note 123 and accompanying text.

3. See infra notes 30–32 and accompanying text.


5. Id. § 305, 116 Stat. at 778.
required a finding of "substantial unfitness." Despite its ambiguity, the change in language was clearly intended to reduce the burden of proof required of the Commission.7

The Act also provides that the SEC may now enter a suspension or bar order on its own in a cease-and-desist proceeding, rather than having to go to court. The applicable standard is the same as the standard now employed by the federal courts—"unfitness."6

The impact of these two new provisions is obvious. First, the Commission will no longer have to go to federal court in order to secure a suspension or bar order. Instead, it will seek most of these orders in the less demanding context of cease­and-desist proceedings.9 Second, the Commission is likely to argue that the task of proving "unfitness" is significantly less demanding than the task of proving "substantial unfitness." Third, by utilizing the cease-and-desist proceeding rather than going to court to seek a suspension or bar order, the Commission will argue that it is no longer required to show a "reasonable likelihood" of future misconduct (as has been required by the courts to support such an order), but need only to demonstrate "some risk" of future misconduct. This standard, or at least some version of it, is the standard the Commission now employs (and the U.S. Court of Appeals for the D.C. Circuit has endorsed) in cease-and-desist proceedings.10

In this Article, I will briefly review the history of the Commission’s suspension and bar powers prior to enactment of the Sarbanes-Oxley Act.11 I will then briefly examine both the character of cease-and-desist proceedings prior to Sarbanes-Oxley, and the law that governs those proceedings, especially recent case law defining the standard for entering a cease-and-desist order.12 I will then trace the evolution of those portions of Sarbanes-Oxley which changed the standard for entry of a suspension or bar order from "substantial unfitness" to "unfitness," and discuss what this change might mean in practice.13 Finally, I will explore the strengths and weaknesses of the new statutory regime.14

7. See infra the section entitled "Gaps in the Sarbanes-Oxley Legislative History."
10. See infra the section entitled "The Evolution of the 'Some Risk' Standard in Cease-and-Desist Proceedings."
12. See infra the section entitled "The Rise and Use of Cease-and-Desist Proceedings."
13. See infra the sections entitled "The Origins and Unfolding of the Sarbanes-Oxley Suspension and Bar Provisions" and "Gaps in the Sarbanes-Oxley Legislative History."
14. See infra the section entitled "The Strengths and Weaknesses of the New Regime."
The most obvious strengths of the new legislation are (i) its efficiency; (ii) its symbolic value (in enacting Sarbanes-Oxley, Congress has endorsed the Commission's view that it should have new and powerful tools to hold executives accountable when they fail in their fiduciary duties); and (iii) the fact that the Commission is now in parity with other federal agencies, specifically federal banking regulators, in its ability to administratively suspend and bar individuals who flagrantly violate its rules.

There are several problems with the new legislation, however, which are compounded by the meager legislative history that accompanies the Sarbanes-Oxley Act. These problems include: (i) neither the statute nor its legislative history provides any useful parameters by which courts or the Commission may evaluate the critical issue of "unfitness"; (ii) both the statute and its legislative history fail to distinguish between conduct that may warrant a finite-term suspension from serving as a public company officer or director and the more egregious types of conduct that may warrant a lifetime bar; (iii) both the statute and its legislative history fail to resolve the issue of most concern to the Commission—whether and in what ways the Commission will have to demonstrate a likelihood of recurring misconduct before a court will enter a suspension or bar order or before entering its own suspension or bar order in a cease-and-desist proceeding; and (iv) the statute fails to provide for a "safety valve" by which debarred persons, after a reasonable period of time, might have a meaningful chance to resume the right to seek executive-level work commensurate with their skills.

A BRIEF HISTORY OF THE SEC'S SUSPENSION AND BAR POWERS

THE INJUNCTIONS-ONLY ERA

From 1934, when the SEC was created, until 1990, when the Securities Enforcement Remedies and Penny Stock Reform Act (the "Remedies Act") was passed, the primary tool available to the SEC Enforcement Division was the injunction. The injunction is, in fact, many different tools, because it encompasses such orders as disgorgement of profits, orders to discontinue specific violations of the law, orders imposing a receivership on misbehaving corporations, and

other ancillary orders such as those requiring the appointment of a compliance officer or new board-level committee. The most encompassing type of injunction is the "obey-the-law" injunction, which prohibits the defendant from violating any provision of the federal securities laws.

Prior to enactment of the Remedies Act, the Commission believed that its power to seek an injunction also included the power to seek an order suspending or barring a defendant from serving as an officer or director of the company within which the securities violation had occurred; in effect, this was a court-ordered removal from office. The Commission also believed that the power to seek an injunction included the power to seek an order suspending or barring a defendant from serving as an officer or director of any public company. Certainly, the Commission often included such a request in its complaints. It appears, however, that, prior to passage of the Remedies Act in 1990, only one such order was ever actually entered by a federal district court. Nevertheless, these types of orders were routinely included in dozens of pre-Remedies Act settlements. Ultimately, in a case involving the colorful Victor Posner, the U.S. Court of Appeals for the Second Circuit confirmed that the Commission did, in fact, have the authority to seek a suspension and bar order as an ancillary remedy, even in the absence of express statutory authority.

THE REMEDIES ACT PROVIDES EXPRESS AUTHORITY TO SEEK SUSPENSION AND BAR ORDERS IN COURT

Beginning in 1987, under the direction of Chairman David S. Ruder, and continuing into the George H. W. Bush administration, under the direction of Chairman Richard C. Breeden, the Commission pursued four key legislative initiatives:


21. See Barnard, The SEC's Suspension and Bar Powers in Perspective, supra note 11, at 1257 n.19 and accompanying text.


23. See SEC v. Techni-Culture, Inc., [1973–1974 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,301, at 95,759 (D. Ariz. Apr. 2, 1974) (ordering that defendant White is "hereby prohibited from assuming a position as or continuing to act as either an officer or director of any public company except upon a showing to the Court that measures have been taken to prevent repetition of the conduct alleged. . . .").


(i) a proposal by which the Commission would receive express authority to seek civil penalties in litigated proceedings; (ii) a proposal by which the Commission would receive authority to conduct its own administrative proceedings, known as cease-and-desist proceedings, against unregulated securities laws violators as well as regulated professionals; (iii) a proposal to expressly authorize federal district courts to enter suspension and bar orders in litigated proceedings; and (iv) a proposal by which the Commission would, itself, be authorized to enter suspension or bar orders in cease-and-desist proceedings.

The first proposal, civil penalties, bore fruit when the Remedies Act was passed in 1990. The Remedies Act authorized the Commission to seek, and district courts to impose, monetary penalties for violations of the Securities Act, the Exchange Act, the Investment Company Act, and the Investment Advisers Act. The second proposal, cease-and-desist powers, also bore fruit through the Remedies Act. The Act provided that the Commission may order a person who "is violating, has violated, or is about to violate any provision of [the federal securities laws]," to cease-and-desist from committing the violation. The Commission may also enter a cease-and-desist order against any person that "is, was, or would be a cause of [a securities law] violation." The third proposal, express suspension and bar authority for the federal district courts, also was successful, though not in the way the Commission had initially hoped. The Remedies Act expressly authorized the district courts to enter a suspension or bar order only in cases involving scienter-based violations. The standard for determining whether a suspension or bar order was appropriate was whether the defendant's conduct reflected "substantial unfitness to serve."

Only the fourth proposal failed. Congress denied the Commission the authority to enter suspension or bar orders administratively as part of its cease-and-desist powers. Critics had warned that granting such authority would confer on the

29. See Securities Act § 8A(a), 15 U.S.C. § 77h-1(a); Exchange Act § 21C(a), 15 U.S.C. § 78u-3(a); Investment Company Act § 9(f)(1), 15 U.S.C. § 80a-9(f)(1); Investment Advisers Act § 203(k)(1), 15 U.S.C. § 80b-30(k)(1). The Commission is also authorized to order the respondent to comply, or to take steps to effect compliance, with the relevant securities statute upon such terms and conditions and within such time as the Commission may specify.
30. For example, the Commission's initial proposal would have permitted the entry of a suspension or bar order for any securities law violation, including negligent violations, and provided no standard by which a determination could be made. See Barnard, The Securities Law Enforcement Remedies Act of 1989, supra note 11, at 33.
31. See Committee on Federal Regulation of Securities, Report of the Task Force on SEC Settlements, 47 Bus. Law. 1083, 1104 (1992) (noting that “Congress intended corporate bars for use against ‘deliberate fraudulent conduct,’ and suggested that the remedy may be appropriate [only] against recidivists or in cases where the violation was ‘particularly egregious’”).
Commission "unwarranted power and would distort its proper role in maintaining the integrity of the capital markets."

**THE COURTS' INTERPRETATION OF THE "SUBSTANTIAL UNFITNESS" STANDARD**

Following enactment of the Remedies Act, federal district courts soon began construing "substantial unfitness" by reference to the so-called "six-factor" test, which called for consideration of the following six factors: (1) the 'egregiousness' of the underlying securities law violation; (2) the defendant's 'repeat offender' status; (3) the defendant's 'role' or position when he engaged in the fraud; (4) the defendant's degree of scienter; (5) the defendant's economic stake in the violation; and (6) the likelihood that misconduct will recur." The six-factor test was later refined by the Second Circuit in SEC v. Patel. The Patel court recognized the six-factor test as "useful in making the unfitness assessment," but went on to caution:

[W]e do not mean to say that [the six factors] are the only factors that may be taken into account or even that it is necessary to apply all these factors in every case. A district court should be afforded substantial discretion in deciding whether to impose a bar to employment in a public company.

Relying on the six-factor test or some variant of it, courts from 1990 until 2002 issued only two published opinions denying outright the Commission's requests for a suspension or bar order. With these two exceptions, however, the Commission was consistently successful throughout the 1990s whenever it sought a suspension or bar order. In two cases, the court declined to enter a lifetime bar order, but instead entered six-year and ten-year suspension orders, respectively, applicable across all industries. In another case, the court declined to enter an order applicable across all industries, but rather entered a lifetime bar order precluding the defendant from serving as an officer or director of any banking or financial institution. In still another case, the U.S. Court of Appeals for the

35. 61 F.3d 137 (2d Cir. 1995).
36. Id. at 141.
37. Id.
38. See SEC v. Pace, 173 F. Supp. 2d 30, 34 (D.D.C. 2001) (holding that the defendant could be enjoined from engaging in the type of conduct proven in this case but that the Commission had failed to establish that he should be barred); SEC v. Shah, [1994-1995 Transfer Binder] Fed. Sec. L. Rep. ¶ 98,374, at 90,592 (S.D.N.Y. 1993) (holding that where the defendant, a first offender, had already been disciplined in parallel proceedings and permanently barred from doing business with the FDA, the Commission had not demonstrated a need for either a permanent bar or suspension order).
Second Circuit cautioned against knee-jerk resort to a lifetime bar order when a finite suspension or an industry-specific order might protect the interests of investors just as well.41 In essence, the court in SEC v. Patel created a hierarchy of options, in which lesser sanctions were to be considered and rejected before a court could enter the more draconian sanction of a lifetime bar.

Before imposing a permanent bar, the court should consider whether a conditional bar (e.g., a bar limited to a particular industry) and/or a bar limited in time (e.g., a bar of five years) might be sufficient, especially where there is no prior history of unfitness . . . . If the district court decides that a conditional ban or a ban limited in time is not warranted, it should give reasons why a lifetime injunction is imposed.42

The case was remanded and later settled when the defendant voluntarily accepted the imposition of a lifetime bar.43

With the exception of these few cases, however, and the rare case in which the Commission withdrew its request for a suspension or bar order,44 the Commission regularly succeeded under the Remedies Act in persuading the courts to enter a lifetime bar order.45 It was also successful in securing lifetime bar orders in scores of settled cases.46

41. SEC v. Patel, 61 F.3d 137, 142 (2d Cir. 1995).
42. Id.
43. E-mail from Michael J. Resko (Patel’s defense counsel) to Jayne W. Barnard, Professor of Law, The College of William and Mary (April 4, 2002) (on file with The Business Lawyer).
44. See, e.g., SEC v. Antar, 15 F. Supp. 2d 477, 533 n.33 (D.N.J. 1998) (noting that the Commission had apparently decided not to press the suspension or bar issue).
It is thus curious that in February 2002, Stephen M. Cutler, Director of the Division of Enforcement, complained that the federal courts were imposing an

"unreasonably high" standard of proof in suspension and bar cases. He also claimed that "when it comes to O and D bars, the courts have simply lost their way."46

**The Courts' Insistence that the Commission Demonstrate a "Reasonable Likelihood of Future Misconduct"**

At the center of the Commission's concern about the federal courts' approach to suspension or bar orders was the fact that, before entering such an order, the courts were insisting that the government make an evidentiary showing that the defendant posed a "reasonable likelihood of future misconduct."49 This requirement is not surprising, given that federal courts require a showing that misconduct is reasonably likely to recur prior to entry of any type of injunction.50 Still, the Commission seemed confounded by the problem of proving a reasonable likelihood of future misconduct, especially in cases involving first-time offenders. The Enforcement Division staff objected to the idea expressed by the Second Circuit in [*Patel*]51 that first-time offenders should rarely be subject to a lifetime bar order. They were especially worried that, in catastrophic cases such as Enron, Adelphia, or WorldCom, lifetime bar orders might not be available.

The biggest problem, from the Commission's perspective, was the Second Circuit's insistence that concrete evidence of a threat of future misconduct is "always an important element in deciding whether [to order] a lifetime ban."52 "Although it is not essential for a lifetime ban that there be past violations," the court said, defendant Dunlop had consented to the entry of a lifetime bar order; SEC v. Delta Rental Sys., Inc., Litigation Release No. 13073, 50 S.E.C. Docket 0144 (Oct. 29, 1991) (reporting that defendant Carvajal had consented to the entry of a lifetime bar order). This is an incomplete list of the cases in which defendants voluntarily accepted a lifetime bar order.

48. Id.
49. See, e.g., SEC v. Chester Holdings, Ltd., 41 F. Supp. 2d 505, 527-30 (D.N.J. 1999) (entering a lifetime bar order against one defendant where the "likelihood of future misconduct [was] high" but declining to do so against another defendant where the "likelihood of future violations [was] not as clear").
50. See, e.g., SEC v. Bilzerian, 29 F.3d 689, 695 (D.C. Cir. 1994) (holding that if a defendant has violated the federal securities laws, the SEC is entitled to a permanent injunction "if the court determines there is a reasonable likelihood that [the defendant] will violate the laws again in the future"); SEC v. Youmans, 729 F.2d 413, 415 (6th Cir. 1984) (holding that the applicable test is "whether the SEC could show a reasonable and substantial likelihood that [the defendant], if not enjoined, would violate the securities laws in the future"), cert. denied sub nom. Holliday v. SEC, 469 U.S. 1034 (1984); SEC v. Bonastia, 614 F.2d 908, 912 (3d Cir. 1980) (holding that to obtain an injunction, the SEC must show that "there is a reasonable likelihood that the defendant[s], if not enjoined, will again engage in the illegal conduct"); SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1100 (2d Cir. 1972) (noting that the "critical question in determining whether to issue an injunction is "whether there is a reasonable likelihood that the wrong will be repeated"). See generally United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953).
51. 61 F.3d 137, 142 (2d Cir. 1995). See infra notes 53-54, 132-33 and accompanying text.
52. See also SEC v. Chester Holdings, Ltd., 41 F. Supp. 2d 505, 530 (D.N.J. 1999) (declining to enter a lifetime bar order, but instead entering a five-year suspension order against defendant Constance Pignatiello, because, unlike her husband (who was barred), she was not "a repeat offender").
53. [*Patel*], 61 F.3d at 141.
"we think that it is essential, in the absence of such violations, that a district court articulate the factual basis for a finding of the likelihood of recurrence." This problem was not new to the Commission. Similar concerns had surfaced in injunction cases where courts held that the Commission had failed to provide sufficient evidence to satisfy the "reasonable likelihood of future misconduct" test, especially in cases involving a single violation.

In *SEC v. Ingoldsby*, for example, the court found that the defendant's insider trading was an "isolated event" and his post-trial assurances that he would not again violate Rule 10b-5 were sufficiently credible to obviate the need for an injunction. In *SEC v. Scott*, the court found that, even though one of the defendants, Raymond Dirks, had participated in a public offering with knowledge of "grossly misleading" misstatements in the prospectus, and even though he had a record of past misconduct before the Commission, evidence from counsel with whom he had worked on other offerings suggested that he took great pains to comply with the federal securities laws. Accordingly, the court held that the Commission had failed to establish a "reasonable likelihood that [his] past wrongdoing [would] recur."

Thoughtful courts recognized, however, that past misconduct could be "highly suggestive" of the likelihood of future misconduct and that even a single violation or a cluster of related violations, if sufficiently egregious, could support the entry of an obey-the-law injunction. The legislative history of the Remedies Act

54. Id. at 142.
56. Id. at 96,693.
57. Id.
59. Id. at 1528.
60. Id. at 1537.
61. Id. at 1535–37; see also SEC v. Pros Int'l, Inc., 994 F.2d 767, 769 (10th Cir. 1993) (upholding denial of an injunction where there was "no evidence that future violations are likely"); SEC v. Monarch Fund, 608 F.2d 938, 943 (2d Cir. 1979) (reversing the trial court's entry of an injunction where the SEC had failed to show "a realistic likelihood of recurrence" of misconduct); SEC v. Yun, 148 F. Supp. 2d 1287, 1294 (M.D. Fla. 2001) (denying the Commission's request for an injunction because future violations were unlikely—the defendants' actions were isolated, the conduct was not egregious, and participants regretted their involvement), aff'd in part and vacated in part, 327 F.3d 1263 (11th Cir. 2003); SEC v. Enters. Solutions, Inc., 142 F. Supp. 2d 561, 579 (S.D.N.Y. 2001) (refusing to enter an injunction against one of the defendants where the Commission failed to demonstrate that he was likely to commit further violations); SEC v. Globus Group, Inc., 117 F. Supp. 2d 1345, 1347 (S.D. Fla. 2000) (refusing to enter injunction where the Commission's action was based on "isolated, as opposed to recurrent, violations of the securities laws"); SEC v. Falbo, 14 F. Supp. 2d 508, 529 (S.D.N.Y. 1998) (declining to enjoin one of the defendants because the Commission had failed to demonstrate that it was reasonably likely that he would commit future violations), modified by 1998 U.S. Dist. LEXIS 16020 (S.D.N.Y. Sept. 8, 1998); SEC v. Big D Oil & Gas Co., 434 F. Supp. 589, 591 (D. Tex. 1977) (refusing to issue injunction).
63. See, e.g., Mgmt. Dynamics Inc., 515 F.2d at 807-08 (upholding the entry of an injunction against defendant Levy, even though his misconduct involved communications involving a single corporate transaction); SEC v. Gaspar, [1984–1985 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,004, at 90,980 (S.D.N.Y. Apr. 15, 1985) (entering an injunction even though the defendant's unlawful tips were all communicated in connection with a single tender offer).
also suggested that a suspension or bar order might be warranted, even in the absence of a history of repeated misconduct, if the conduct at issue could be characterized as "egregious." Thus, although most of the Remedies Act decisions in which suspension or bar orders were entered involved recidivism, at least one of the decisions involved a spectacular first-time offense. It is difficult, in short, to understand why the Enforcement Division was expressing so much anxiety about its authority.

THE RISE AND USE OF CEASE-AND-DESIST PROCEEDINGS

Concurrent with the period during which the Commission was seeking suspension and bar orders in litigated proceedings in federal district courts—usually successfully—the Commission was also perfecting its use of the cease-and-desist proceeding, which, like the judicial suspension and bar authority, was authorized by the Remedies Act. A cease-and-desist order may simply proscribe unlawful conduct, or it may "require [the defendant] to comply, or to take steps to effect compliance [with the law] upon such terms and conditions and within such time as the Commission may specify."*66

Cease-and-desist proceedings offer the Commission many advantages over a litigated civil enforcement action, including: (i) the proceedings typically move much more quickly than a litigated proceeding; (ii) the evidentiary requirements are more relaxed; (iii) discovery is less generous; and (iv) unlike courts, which

64. See S. Rep. No. 101-337, at 21 (1990) ("A permanent bar might be appropriate if the violation were particularly egregious or the violator was a recidivist.").
65. See, e.g., SEC v. First Pac. Bancorp, 142 F.3d 1186, 1193 (9th Cir. 1998) (noting the defendant was a recidivist); SEC v. Chester Holdings, Ltd., 41 F. Supp. 2d 505, 530 (D.N.J. 1999) (noting that the case was not defendant Joseph Pignatiello's first encounter with the securities laws: "He has been restrained, censured, fined, and even imprisoned for prior securities violations and is currently facing criminal charges . . . . In light of this, as well as the fact that he has failed to assure this court that he will not engage in future violations . . . . the likelihood of future misconduct is high."); see also SEC v. Drexel Burnham Lambert Inc., 837 F. Supp. 587, 589 (S.D.N.Y. 1993) (noting that the SEC had sued the defendants for antifraud violations twice before), aff'd sub nom. Posner v. SEC, 16 F.3d 520 (2d Cir. 1994).
66. See, e.g., SEC v. Robinson, [2002 Transfer Binder] Fed. Sec. L. Rep. ¶ 91,948, at 90,479 (S.D.N.Y. July 16, 2002) (recommending a lifetime bar in light of the fact that defendant's violations were not only "egregious," but also "flagrant, indeed one might say outrageous"). The Robinson court also took into account the defendant's failure to admit wrongdoing in the underlying offense, plus his violation of a preliminary injunction during the pendency of the case. Id.
67. See supra notes 28-29 and accompanying text.
69. See 17 C.F.R. § 201.360 (2003) (amending rules to streamline procedures and reduce delay; among the new rules are deadlines for completion of administrative proceedings of either 120, 210, or 300 days).
71. John F. X. Peloso & Stuart M. Sarnoff, The Scope of Discovery Available in SEC Administrative Proceedings, 224 N.Y.L.J. 3, 3 (Aug. 17, 2000) ("In contrast to actions commenced by the commission in federal district court, where the parties enjoy equal access to the full spectrum of discovery devices available under the Federal Rules of Civil Procedure, discovery in administrative proceedings is extremely limited.").
are expected to tailor their injunctions so as not to interfere with lawful conduct, the Commission is not required to finely tailor its cease-and-desist orders or to seek the least restrictive means of confining the defendant's future activities. Another advantage to the Commission of cease-and-desist proceedings over litigated proceedings is (v) the strong degree of deference given by reviewing courts to Commission-authorized cease-and-desist orders. It is not surprising, then, that in the first decade after enactment of the Remedies Act, permanent cease-and-desist orders became "one of the SEC's most used remedies."

The History and Purpose of Cease-and-Desist Proceedings

Cease-and-desist proceedings under section 21 C were created as an "alternative remedy' to an injunction [and were designed to be used] against persons who commit isolated infractions." The premise behind the cease-and-desist proceeding was that not all securities law violations warranted the imposition of an injunction and that sometimes an injunction was "arguably too harsh" for the misconduct alleged. Congress also believed that some mechanism should be found by which the Commission could resolve simple cases "without protracted negotiation or litigation." The defendants for whom the cease-and-desist proceeding would be appropriate were those who "p[resent] a lesser threat to investors [than those whose cases would more appropriately be heard by a U.S. district court]." It was understood that the collateral consequences of a cease-and-desist order would be less burdensome than a comparable court-ordered obey-the-law injunction.

The Evolution of the "Some Risk" Standard in Cease-and-Desist Proceedings

As noted above, it has long been established that, for entry of an injunction, any injunction, in a federal district court proceeding, the Commission must

72. See, e.g., Gemveto Jewelry Co v. Jeff Cooper, Inc., 800 F.2d 256, 259 (Fed. Cir. 1986) ("[I]njunction should be narrowly tailored to fit the [defendant's] specific legal violations."); Society for Good Will to Retarded Children, Inc. v. Cuomo, 737 F.2d 1239, 1251 (2d Cir. 1984) ("Injunction should be narrowly tailored to fit the specific legal violations adjudged.").
73. KPMG v. SEC, 289 F.3d 109, 122–23 (D.C. Cir. 2002) ("If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal.").
74. See Committee on Federal Regulation of Securities, Report of the Task Force on SEC Settlements, 47 BUS. LAW. 1083, 1123–24 (1992) ("Traditionally, courts have interpreted the Commission's discretion in cases litigated before SEC ALJs to be quite broad. Provided the Commission articulates its rationale for a given sanction, and the court confirms the Commission's findings that violations have occurred, courts rarely disturb the sanction imposed as too severe.").
78. Id. at 1203 (quoting Chairman Richard C. Breeden, then-chairman of the Commission).
79. Id.
80. Id. at 1227–28.
demonstrate a "reasonable likelihood of future misconduct." In recent years, the Commission has taken the position that a lesser showing will suffice for entry of a cease-and-desist order.

As late as 2000, most administrative law judges (ALJs) hearing SEC cease-and-desist cases assumed that, in order to support a cease-and-desist order, the Commission would have to satisfy the "reasonable likelihood" standard. Some commentators, however, drawing on the experiences of other federal agencies, suggested that a lesser standard might suffice. Soon, the Commission began advocating, and some of the Commission's administrative law judges began considering, alternatives to the "reasonable likelihood" standard.

Sooner or later, the Commission would have to resolve the issue on the record, and the opportunity arose in 2001, when the Commission, for the first time, embraced and articulated its preferred "some risk" standard for the entry of a cease-and-desist order. The case involved an action against KPMG Peat Marwick for failure to observe auditor independence requirements. In reversing the ALJ's refusal to issue a cease-and-desist order, the Commission ruled that the "reasonable likelihood of future misconduct" standard applicable in litigated proceedings to support an injunction was not required in a cease-and-desist proceeding. After reviewing the standards imposed on other federal agencies with cease-and-desist authority, it concluded that "while Congress intended that cease-and-desist orders be forward-looking, like injunctions, it intended that the showing of risk of future violations be significantly less than that required for an injunction."

The Commission went on to articulate the applicable standard as the "some risk" standard:

Though "some" risk is necessary, it need not be very great to warrant issuing a cease-and-desist order. Absent evidence to the contrary, a finding of violation raises a sufficient risk of future violation. To put it another way, evidence showing that a respondent violated the law once probably also shows a risk of repetition that merits our ordering him to cease and desist. Our conclusion is suggested, though not compelled, by the statutory language.

81. See supra the section entitled "The Courts’ Insistence that the Commission Demonstrate a Reasonable Likelihood of Future Misconduct."
82. See In re Flanagan, 2000 WL 98210, at *36 (Jan. 31, 2000) ("Assuming, without deciding, that the Division must show a reasonable likelihood of future violations, that showing has been made here as to all three Respondents.").
83. See Smith, supra note 75, at 1226-27.
84. See Flanagan, 2000 WL 98210, at *36 (noting the "dispute" among the Commission's ALJs as to whether the Commission may only impose a cease and desist order where the respondent is reasonably likely to commit similar securities violations in the future, or whether no additional showing beyond the underlying violation itself is necessary); see also Smith, supra note 75, at 1198 (noting that "[t]he agency, however, has yet to clarify the circumstances under which it will impose a cease-and-desist order").
85. See In re Feeley & Wilcox Asset Mgmt. Corp., 2000 WL 628245, at *22 (May 16, 2000) ("The Commission has not [yet] resolved the issue of whether a cease and desist order requires a finding that there be a likelihood of a future violation.").
87. Id. at *114.
The statute specifies that we may impose a cease-and-desist order on a person who "has violated" the securities laws. This contrasts with our authority to seek injunctive relief in those instances when a person "is engaged or about to engage" in violative conduct. 88

When challenged on this position, the Commission quickly backtracked and conceded that the entry of a cease-and-desist order should not be an "automatic" consequence of committing a single securities law violation. 89 Instead, it promised to "continue to consider our traditional factors in determining whether a cease-and-desist order is an appropriate sanction based on the entire record." 90 It described its intended process as follows:

Many of [the traditional] factors are akin to those used by courts in determining whether injunctions are appropriate, including the seriousness of the violation, the isolated or recurrent nature of the violation, the respondent's state of mind[,] the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his or her conduct, and the respondent's opportunity to commit future violations. In addition, we consider whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought in the same proceedings. This inquiry is a flexible one and no one factor is dispositive. 91

The U.S. Court of Appeals for the D.C. Circuit, by a divided court, affirmed the Commission's cease-and-desist order in the KPMG case. 92 The majority opinion upheld the Commission's use of a negligence, rather than a scienter, standard in a section 21C proceeding. 93 It also embraced the Commission's adoption of a "some-risk-of-future-misconduct" standard. 94 On the issue of whether a single violation could suffice to support a cease-and-desist order under the "some risk" standard, however, the majority blinked. Recognizing the issue as "problematic," 95 the court carefully reviewed the Commission's approach to the "some risk" issue. Even though, the court noted, the Commission in its original KPMG opinion had stated that a single violation sufficed to show the necessary likelihood of recurrence to support a cease-and-desist order, on reconsideration, the Commission had cited multiple violations by KPMG. 96 The court went on to note:

88. Id. at *102–*03.
90. Id.
91. Id.
92. KPMG v. SEC, 289 F.3d 109 (D.C. Cir. 2002).
93. Id. at 120.
94. Id. at 124–26.
95. Id. at 124.
96. Id. at 125.
The Commission's statement on reconsideration suggests that it may no longer consider, as it initially made clear, that any one of its findings of a violation, standing alone, would suffice under its standard to enter a cease-and-desist order. At oral argument counsel for the Commission argued that the language in the Reconsideration Order is insufficiently precise to suggest that the Commission had changed its mind. In truth, the Reconsideration Order leaves this unclear. Nevertheless, in light of the Commission's having found several serious violations—all but one of which we affirm—we conclude that a remand is unnecessary. 97

In other words, on the issue of whether a "some-risk-of-future-misconduct" standard or some higher standard should be required for entry of a cease-and-desist order, the majority deferred to the Commission. On the issue of whether a single violation could satisfy the "some risk" standard, the majority equivocated: "[W]e conclude that a remand to allow the Commission to clarify whether simply one or a combination of two or more of the violations it found suffice to meet its standard for finding a risk of future violation to enter a cease-and-desist order is unwarranted in light of the Commission's [multiple] findings of violations . . . ." 98

What this all means is (i) the Commission defined for itself the standard required to support a cease-and-desist order as merely "some risk" of future misconduct; (ii) the court of appeals acquiesced in this standard, at least under the facts in the KPMG case; (iii) the court failed to address the question whether a single violation, without more, could ever satisfy the Commission's "some risk" standard; (iv) after Sarbanes-Oxley, the Commission will inevitably seek to apply its "some risk" standard to requests for suspension or bar orders in cease-and-desist proceedings, even though suspension and bar orders are qualitatively different than other forms of cease-and-desist orders; 99 and (v) the Commission will probably argue that even a single, non-spectacular violation of the securities laws may be sufficient to support a suspension or bar order.

THE ORIGINS AND UNFOLDING OF THE SARBANES-OXLEY SUSPENSION AND BAR PROVISIONS

The Enron scandal began to unfold on October 16, 2001, the date on which Enron filed its quarterly financial figures and revealed that it was eliminating over one billion dollars in shareholders' equity. 100 From that day forward, and throughout early 2002, the SEC was constantly exhorted to be more aggressive, to act more swiftly, and to take urgent action against corporate wrongdoers. In his March 7, 2002 public statement on corporate reform initiatives, President George W. Bush emphasized the need for "sound regulation and remedies where needed,

97. Id. (citation omitted).
98. Id. at 126.
99. See infra the section entitled "Lack of Guidance on the 'Likelihood of Future Misconduct' Issue."
without inviting a rush of new lawsuits that exploit new problems instead of solving them." Among other elements of his ten-point reform plan, Bush indicated his commitment to enhanced suspension and bar powers for the Commission: "CEOs or other officers who clearly abuse their power should lose their right to serve in any corporate leadership positions. This proposal, which would require legislation, would authorize the SEC to ban individuals from serving as officers or directors of publicly-held corporations if they engage in serious misconduct." SEC Chairman Harvey L. Pitt also stressed the need for stronger enforcement tools at the Commission. Stephen Cutler, the Commission's Director of Enforcement, went on the speaker's circuit, arguing that so long as suspension and bar authority rested exclusively with the courts, individuals "engaged in egregious—even criminal—misconduct" would be free to resume or secure positions as corporate officers and directors. "The role of officers and directors is far too important to allow those with a questionable commitment to the interests of shareholders to serve," Cutler argued.

In response to these cries for legislative reform, on April 24, 2002, the House of Representatives passed the Corporate and Auditing Accountability, Responsibility, and Transparency Act of 2002. One of the issues that was hotly debated on this bill was whether the judicial standard for suspension or bar orders should be changed from "substantial unfitness" to simple "unfitness." The Democrats favored a change in the standard, while the Republicans favored the status quo. After considerable wrangling, the House Financial Services Committee decided that the "substantial unfitness" standard should not be amended but should be left intact and the House ultimately adopted that position by a vote of 334 to 90. The House did pass a provision, however, extending authority to the SEC to enter suspension and bar orders in a cease-and-desist proceeding, governed by the same "substantial unfitness" standard as then applicable in the courts.

104. Cutler, supra note 47.
105. Id.
106. See H.R. 3763.
107. Cutler, supra note 47.
108. Id.
109. Id. The Republicans were deeply committed to this position. Until well into July 2002, the White House continued to advocate SEC suspension and bar power authority only where the defendants had engaged in "serious misconduct." Richard A. Oppel, Jr., Bush and Democrats Still Deeply Split on What Needs to Be Done, N.Y. Times, July 10, 2002, at C5.
Then, as corporate reform moved from the House to the Senate, two important things happened. First, the Democrats took control of the debate, and second, the stock market began a sharp downward drop. From June 1 to July 15, 2002, for example, the S&P 500 index, stressed by the disclosure of accounting scandals at WorldCom, Xerox, and Quest Communications, dropped from 1,040 to 918. On July 23, the S&P index closed at 798.

These developments led to mounting pressure to strengthen the SEC’s hand on a number of issues. The upshot of the process was the passage on July 25, 2002 of the Sarbanes-Oxley Act by a vote of 423 to 3 in the House and 99 to 0 in the Senate. Between April 24, 2002, when the House had passed its tepid version of corporate governance reforms and the end of July 2002, the Republicans had capitulated on almost every issue.

The provisions governing suspension and bar orders, for example, were just as the Democrats had prescribed from the beginning. First, section 305 of Sarbanes-Oxley provides that the standard for the federal courts to use in deciding whether to enter a suspension or bar order is now “unfitness” rather than “substantial unfitness.” Second, section 1105 provides:

In any cease-and-desist proceeding . . . , the Commission may issue an order to prohibit, conditionally or unconditionally, and permanently or for such period of time as it shall determine, any person who has violated section 10(b) or the rules or regulations thereunder, from acting as an officer or director of any [public company], if the conduct of that person demonstrates unfitness to serve as an officer or director of any such issuer.

GAPS IN THE SARBANES-OXLEY LEGISLATIVE HISTORY

The legislative history of the Sarbanes-Oxley Act provides little guidance on the meaning of the new suspension and bar provisions, and especially on the meaning of the new term “unfitness.” There is no reference, for example, to

114. Id. § 1105, 116 Stat. at 809.
116. The House Report refers only to the “substantial unfitness” standard that was included in the House Bill but later revised in conference. H.R. Rep. No. 107-414, at 17, 42-43. The Senate Report says only this: “The sanction of barring securities law violators from serving as officers or directors of
cases in which executives have been removed from office for cause. There is no criticism of existing case law or of specific cases decided under the former "substantial unfitness" standard. 118

Ironically, it is not even clear from the legislative history of Sarbanes-Oxley that the change in language from "substantial unfitness" to "unfitness" was intended to reduce the quantum of proof required of the government. Thomas Newkirk, Associate Director of Enforcement at the SEC, has acknowledged that "a creative defense lawyer might argue that it should be more difficult to determine that someone is 'unfit' than it is to determine that the person is 'substantially unfit.'" 119 In fact, it would not take much creativity to make this argument. Certainly, it is easier for a litigant to demonstrate substantial compliance with a statute than to demonstrate strict compliance with it. 120 Similarly, it is easier for a litigant to show substantial performance of a contract than complete performance. 121

Consequently, it should now be more difficult for the Commission to demonstrate "unfitness" than it was to demonstrate "substantial unfitness." I am not making that argument, however; it is clear from context, if not from Congress, that the "unfitness" standard was intended to reduce the Commission's burden, not increase it.

That being said, there are a number of other problems and omissions in the suspension and bar provisions of the Sarbanes-Oxley Act. We will discuss these problems below. First, though, let us consider the obvious advantages of the new suspension and bar provisions.

Public companies is strengthened by modifying the standard that governs judicial imposition of officer and director bars." S. REP. No. 107-205, at 53. The Conference Report is silent with respect to both sections 305 and 1105.

117. These types of cases, and cases in which non-disclosure of certain forms of misconduct have been found to be a material omission in a proxy statement, might provide some useful illustrations of the sorts of behavior that might render a person "unfit" to serve as a public company officer or director. See Barnard, When Is a Corporate Executive "Substantially Unfit to Serve?", supra note 11, at 1405-09.


120. See, e.g., Metropolitan Life Ins. Co. v. Johnson, 97 F.3d 558, 568 (7th Cir. 2002) ("[T]he doctrine of substantial compliance by its very nature contemplates something less than actual compliance.")

THE STRENGTHS AND WEAKNESSES OF THE NEW REGIME

THE APPEAL OF THE SUSPENSION AND BAR PROVISIONS

The Commission sees several advantages to the Sarbanes-Oxley formula over the Remedies Act formula for suspension and bar orders. Certainly, the new formula is advantageous both because it eliminates the need to go to court in many cases, and, even in those cases that the Commission decides to take to court, it imposes a lower standard of proof—"unfitness" rather than "substantial unfitness"—than was previously required under the Remedies Act.

There is also the issue of parity. Banking regulators have long enjoyed unilateral suspension and bar authority with respect to banking officials. The Commission itself has exercised suspension and bar powers over brokers, investment advisers, and investment company executives without having to go to court. Significantly, when administratively barring a regulated professional, the Commission has not been required to demonstrate that a lifetime bar order is the least restrictive means of protecting the public. Lifetime bars are, thus, commonly ordered against regulated professionals. Suspension and bar powers over unregulated individuals, and the freedom to decide when a lifetime bar order is appropriate, can be seen in this context as just another version of a proven and effective law enforcement tool.

Most importantly, the addition of suspension and bar powers to the Commission’s arsenal sends a strong symbolic message. At the time he signed Sarbanes-Oxley, President Bush declared that he intended to "do everything in [his] power to end the days of cooking the books, shading the truth, and breaking our laws." Empowering the SEC to cut off a defendant’s primary means of livelihood offers

122. See 12 U.S.C. § 1818(c)(1) (2000) (permitting debarment of a banking official where she has "engaged or participated in any unsafe or unsound [banking] practice" from which "the insured depository institution’s depositors have been or could be prejudiced" and which "demonstrates willful or continuing disregard by such party for the safety or soundness [of the banking system]"); see also id. § 2264(b) (permitting debarment of any director or officer of an institution in the Farm Credit System who "has evidenced either his personal dishonesty or a willful or continuing disregard for [the] safety and soundness [of the system]").

123. See 15 U.S.C. § 78o(b)(4)(D) (2000) (brokers); id. § 80b-3(e) (investment advisers); id. § 80a-9(b) (investment company executives).


an unquestionably powerful tool with which to secure cooperation, elicit critical testimony, draw attention to high-profile wrongdoers, and impose crippling sanctions on defendants who refuse to cooperate with the government. Seen in the context of widespread corporate abuses, the Congressional decision to expand the Commission's powers in this area is a reasonable response to a pattern of misconduct designed to achieve Congressional objectives in a cost-effective, streamlined way.

PROBLEMS WITH THE STATUTE
Lack of Clarity About What Constitutes "Unfitness"

When the Remedies Act was passed in 1990, Congress provided little useful guidance on the meaning of the term "substantial unfitness." This encouraged federal judges to create their own meaning, a process with which the Commission later took exception. 127 Now, Congress has passed the Sarbanes-Oxley Act and once again it has provided no guidance on the meaning of the new term "unfitness." Once again, the courts will devise their own approach to this issue, perhaps deviating little from their approach to the earlier "substantial unfitness" standard. One hopes the courts will focus on the core of the issue: whether a defendant is, in fact, unfit to serve as an officer or director of a public company. This inquiry should include consideration of (i) whether the defendant has an understanding of the fiduciary role of an officer or director; (ii) whether there is reason to believe that she is unable to perform that role professionally and responsibly in a setting other than the setting in which her prior misconduct occurred; (iii) whether she has expressed contrition for past misconduct and whether that expression is credible; and (iv) whether carefully-drawn limitations, such as a prohibition against participating in the preparation of financial documents or communicating with analysts or the public, might serve to ensure that, if the defendant is hired as an officer or director, future misconduct will not recur. The primary question at the end of the day will be whether the defendant's conduct was so far outside the norms of professional conduct—because of its clandestine nature, the magnitude of its harm, or the contempt it showed for the interests of investors—that the defendant should be regarded as incapable of rehabilitation.

Regardless of which approach the courts ultimately embrace, the public would have benefited greatly had Congress been more specific in its articulation of the problem or problems it was trying to remedy. 128 At a minimum, Congress should have specified the sorts of issues to be taken into consideration before entering a

127. See Cutler, supra note 47 and accompanying text.
128. As an example of the kind of clarity that would have been useful, see 15 U.S.C § 80a-9(b) (2000), governing the debarment of investment company executives. Under this provision, an executive may be debarred only where:

(1) [he or she] has willfully made or caused to be made in any registration statement, application or report filed with the Commission under this subchapter any statement which was at the time and in the light of the circumstances under which it was made false or misleading with
suspension or bar order, either in the text or in the legislative history. For example, is a tippee who trades on non-public information about a company with which she is not affiliated inevitably going to be characterized as “unfit”? Should every accountant or investment banker caught up in a fraudulent investment scheme be treated as “unfit”? Which aspects of a securities law violation should matter to the decision maker? The degree of scienter? The nature of the offense? The character of the victims? The amount of harm done? In other contexts, Congress has attempted to answer these questions. Now, only case law will yield the answers.

(1) he or she has willfully violated any provision of the Securities Act of 1933 . . . or of the Securities Exchange Act of 1934 . . . or of subchapter II of this chapter, or of this subchapter, or of the Commodity Exchange Act . . . or of any rule or regulation under any of such statutes;

(2) he or she has willfully violated any provision of the Securities Act of 1933 . . . or of the Securities Exchange Act of 1934 . . . or of subchapter II of this chapter, or of this subchapter, or of the Commodity Exchange Act . . . or of any rule or regulation under any of such statutes;

(3) he or she has willfully aided, abetted, counseled, commanded, induced, or procured the violation by any other person of the Securities Act of 1933 . . . or of the Securities Exchange Act of 1934 . . . or of subchapter II of this chapter, or of this subchapter, or of the Commodity Exchange Act . . . or of any rule or regulation under any of such statutes;

(4) he or she has been found by a foreign financial regulatory authority to have –

(A) made or caused to be made in any application for registration or report required to be filed with a foreign securities authority, or in any proceeding before a foreign securities authority with respect to registration, any statement that was at the time and in light of the circumstances under which it was made false or misleading with respect to any material fact, or has omitted to state in any application or report to a foreign securities authority any material fact that is required to be stated therein;

(B) violated any foreign statute or regulation regarding transactions in securities or contracts of sale of a commodity for future delivery traded on or subject to the rules of a contract market or any board of trade;

(C) aided, abetted, counseled, commanded, induced, or procured the violation by any other person of any foreign statute or regulation regarding transactions in securities or contracts of sale of a commodity for future delivery traded on or subject to the rules of a contract market or any board of trade;

(5) he or she within 10 years has been convicted by a foreign court of competent jurisdiction of a crime, however denominated by the laws of the relevant foreign government, that is substantially equivalent to an offense set forth in paragraph (1) of subsection (a) of this section; or

(6) he or she by reason of any misconduct, is temporarily or permanently enjoined by any foreign court of competent jurisdiction from acting in any of the capacities, set forth in paragraph (2) of subsection (a) of this section, or a substantially equivalent foreign capacity, or from engaging in or continuing any conduct or practice in connection with any such activity or in connection with the purchase or sale of any security.

For a case suggesting the answer to this question should be “no,” see SEC v. Sargent, 329 F.3d 34, 42 (1st Cir. 2003) (affirming the denial of an injunction and civil penalties for a tippee, notwithstanding the SEC’s argument that such remedies were appropriate).

See, e.g., 5 U.S.C. § 8902a(f) (2000) (requiring a decision on whether to bar a health care provider from participating in Medicare programs to “take into account – (1) the nature of any claims involved and the circumstances under which they were presented; (2) the degree of culpability, history of prior offenses or improper conduct of the provider involved; and (3) such other matters as justice may require”).

Former SEC Commissioner Joe Grundfest recently suggested that leaving these kinds of issues to the courts to resolve serves political ends. See Joseph A. Grundfest, Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation, 54 STAN. L. REV. 627, 628 (2002).
Lack of Focus on Proportionality

As it did in the Remedies Act, Congress in the Sarbanes-Oxley Act has once again failed to distinguish between the types of behavior that might give rise to a finite-term suspension of eligibility from serving as an officer or director of a public company and the types of behavior that should give rise to a lifetime bar order. The statutory standard, “unfitness,” is the same for each. Although unlike the Federal Sentencing Guidelines, this format provides flexibility for courts in determining the appropriate level of sanction, it does suggest a lack of clarity about just what exactly Congress had in mind in this area. Certainly, it should have been possible to delineate one standard of misconduct for a suspension order and a higher standard of misconduct for a lifetime bar. Failure to have done so encourages the sort of muddy thinking (and prosecutorial overreaching) that the court in SEC v. Patel tried to minimize.

Lack of Guidance on the “Likelihood of Future Misconduct” Issue

Although it is clear that the primary motivating factor behind the Commission’s efforts to secure its own suspension and bar powers was the desire to escape from the judge-made requirement that it show a “reasonable likelihood” of future misconduct in order to secure a court-ordered suspension or bar, it is not at all clear that Congress has delivered the intended result. Certainly, there is no indication in the text of the statute or the legislative history that, in litigated proceedings, any showing other than the traditional “reasonable likelihood” standard will be required. Stated another way, it would have been easy enough for Congress in either the text or the legislative history of the Act to set out in plain English the conditions for finding “unfitness” in a litigated proceeding and to make clear whether the “reasonable likelihood” standard or some lesser standard should now apply. Neither the Sarbanes-Oxley Act itself nor the legislative history of the Act, however, says anything about what degree of likelihood of future misconduct will be required for a federal district court to enter a suspension or bar order. Thus, it is possible, even likely, that courts will continue to impose a “reasonable likelihood” standard in suspension and bar cases. In the absence of a clear directive from Congress to the contrary, there is no reason why they should not do so.

132. For example, Congress might have said that simple “unfitness” could warrant entry of a finite-term suspension order, while “significant unfitness” or “undeniable unfitness” or some similar formulation would warrant a lifetime bar order. Any choice of words suggesting a hierarchy of harm would have been useful. Compare typical homicide statutes, which distinguish those types of killings that are eligible for terms of imprisonment from other types of killings that are treated as capital crimes.

133. See supra notes 35–37, 41–42, 51, 53–54 and accompanying text.

134. Support for this approach may be found in the legislative reenactment doctrine, which provides that, “when Congress enacts a comprehensive revision in an area of law while leaving untouched well-established interpretations of the earlier legislation, Congress legislatively enacts the choices and interpretations made.” Douglas M. Branson, Prairie Populist? The Business and Securities Law Opinions of Justice John Paul Stevens, 27 RUTGERS L.J. 605, 620 (1996); see also ROBERT A. KATZMANN, COURTS AND CONGRESS 48–49 (1997) (“When Congress does not give explicit direction about its legislative
There is also no indication, either in the statutory text or in the legislative history of the Sarbanes-Oxley Act, as to whether Congress intended the “some risk” standard or some higher standard to apply in cease-and-desist proceedings. It is likely that the Commission will attempt to apply the “some risk” standard in suspension and bar cases, however, at least until a court rules that it cannot do so. As it happens, a court might make such a ruling in a suspension or bar case if it takes into account the significant difference between a garden variety cease-and-desist order and the much more burdensome suspension or bar order.

Most people would agree, for example, that they would rather submit to a cease-and-desist order that requires them to abstain from future violations of the law (while remaining employed) than submit to a suspension or bar order which prohibits them from serving as an officer or director of a public company, even if that service involves solely legal conduct. Given the difference in the impact of these orders on individuals and their families, it would be entirely reasonable for a reviewing court to conclude that the burden in terms of the future risk that must be shown, should be higher, perhaps much higher, to support a suspension or bar order in a cease-and-desist proceeding than that applicable to other types of cease-and-desist orders.

The argument would go something like this: first, Congress has, in the past, recognized the special impact of suspension or bar orders on professionals. In the case of bankers, for example, Congress recognized:

[T]he power to suspend or remove an officer or director of a bank or savings and loan association is an extraordinary power, which can do great harm to the individual affected and to his institution and to the financial system as a whole. It must be strictly limited and carefully guarded.135

Thus, in passing the Federal Deposit Insurance Corporation Act, which authorized the FDIC to enter suspension and bar orders, the Senate took care to ensure that the banking regulators did not descend to “arbitrary, capricious and overbearing tactics” in dealing with banking officials.136 The Senate committee involved with the drafting of the statute insisted on a "narrow and careful delineation of the circumstances under which a banking official could be suspended or barred."137 “Congress purposefully limited the use of suspension and removal power[s] to certain types of circumstances, well aware of the dangers of granting unfettered discretion to the FDIC to wield such potentially devastating power.”138

Second, in authorizing the use of occupational restrictions as a condition of probation or supervised release in criminal cases, Congress cautioned that such meaning, it not only creates added burdens for the courts, it also increases the risk that the judiciary, in a good faith effort to make sense of the problems before it, will interpret statutes in ways that the legislature did not intend.”).

137. Id. at 871.
138. Id. at 872.
conditions should be imposed only as "reasonably necessary" to protect the public.139 According to the report of the Senate Judiciary Committee,

The Committee recognize[d] the hardship that can flow from preventing a person from engaging in a specific occupation, business, or profession, particularly for those activities requiring many years of education and experience.140

Courts, too, have noted the heavy burden placed on professionals when they are stripped of their right to seek work commensurate with their skills, even temporarily. Courts have spoken of the "serious hardship" imposed when a defendant is barred from seeking work nationwide.141 Courts have also recognized that suspension and bar orders are a "radical measure" of the sort that often requires proof by clear-and-convincing evidence.142

Given this background, and reading the suspension and bar provisions of the Sarbanes-Oxley Act in pari materia with comparable statutes, a court could certainly hold that the Commission, in the context of a cease-and-desist proceeding, should refuse to enter a suspension or bar order unless the Commission can demonstrate a reasonable likelihood, indeed a strong likelihood, that the defendant will continue to pose a risk to the public if permitted to serve as a corporate officer or director. Whether a court will do so remains to be seen.

The Inherent Illegitimacy of a Lifetime Bar Order

Congress has established what apparently was intended to be a modest threshold, simple "unfitness," as the standard for the entry of a lifetime bar order. As the Patel court recognized, however, lifetime bar orders are qualitatively different from finite-term suspension orders, whether they are entered by a federal district judge in a litigated proceeding, or by the Commission in a cease-and-desist proceeding. Lifetime bar orders are punitive in nature,144 inherently overbroad in

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141. FDIC, 619 F. Supp. at 872.
143. See, e.g., Crowe v. Smith, 261 F3d 558, 563 (5th Cir. 2001) (holding that in lawyer suspension and disbarment cases, the state must prove its case by clear and convincing evidence); Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987) (requiring that evidence of need to revoke a teacher's license be clear and convincing). For a time, the federal courts required that the SEC prove its case against regulated professionals by clear and convincing evidence. See, e.g., Whitney v. SEC, 604 F.2d 676, 681 (D.C. Cir. 1979); Collins Sec. Corp. v. SEC, 562 F.2d 820, 824-25 (D.C. Cir. 1977). That position was rejected by the Court in Steadman v. SEC, 450 U.S. 91, 95-96 (1981) (holding that the substantive case against a regulated professional (e.g., a claim that the defendant violated Rule 10b-5) need only be proved by a preponderance of the evidence). At least one court has suggested that the SEC should still be held to a clear-and-convincing standard of proof where the remedy sought "would, in fact, deprive the defendants the ability to continue to pursue his livelihood." SEC v. Moran, 922 F. Supp. 867, 890 (S.D.N.Y. 1996).
144. See Proffitt v. FDIC, 200 F.3d 855, 861 (D.C. Cir. 2000) (noting that a lifetime bar of a banker has a "punitive purpose"); Johnson v. SEC, 87 F.3d 484, 492 (D.C. Cir. 1996) (noting that even a six-month suspension imposes a "punishment").
both scope and duration, and difficult to justify in terms of what we actually know about white collar recidivism. They are, in the civil context, "the most serious punishment available."

It is nonetheless obvious that the Commission is enamored with the lifetime bar order and has recently increased its demands for this sanction. It is, therefore, fair to stop and contemplate whether a lifetime bar order is appropriate in a civil proceeding when a comparable order is not available in a criminal proceeding!

Consider this: convicted criminals are often subjected to occupational restrictions during a period of probation or supervised release. The idea behind these occupational restrictions is that keeping the offender away from the type of environment in which he committed his crime can simultaneously accommodate both maximum autonomy for the unincarcerated defendant and maximum public protection.

Significantly, however, occupational restrictions in criminal cases are extremely limited:


146. See Paul H. Robinson, Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice, 114 Harv. L. Rev. 1429, 1450 (2001) ("A scientist's ability to predict future criminality using all available data is poor; using just the proxy of prior criminal history, a scientist's prediction is even less accurate."); David Weissbrod et al., White-Collar Crime and Criminal Careers 135 (2001) ("It is difficult to predict future criminality on the basis of knowledge of the offender's past social and criminal conduct and circumstances.").

147. McNabb v. SEC, 298 F.3d 1126, 1133 (9th Cir. 2002) (Fisher, J., dissenting).

148. In fiscal year 2002, for example, the Commission sought court orders seeking to bar 126 defendants from serving as an officer or director of a public company, "more than triple the number sought two years earlier." Andrew Countryman, Amid Budget Battle, SEC Chief Notes Soaring Activity, Ctr. Trib., Oct. 24, 2002, at B1.

149. See, e.g., United States v. Jost, 2001 U.S. App. LEXIS 17109, at *2 (10th Cir. July 31, 2001) (upholding an order prohibiting the defendant from engaging in any sales-related employment, any employment which required him to invest money for others, or any employment which required him to render investment advice); United States v. Goodman, 2000 U.S. App. LEXIS 27293, at *3 (10th Cir. Oct. 30, 2000) (upholding an order prohibiting the defendant from being self-employed, or operating as an independent contractor, officer, partner, or manager in any business or business entity without prior approval from his probation officer; also providing that he may not have access to or control over third-party financial information, accounts or transactions or be employed by a telemarketing venture); United States v. Szenay, 1999 U.S. App. LEXIS 13656, at *11 (6th Cir. June 15, 1999) (upholding an order prohibiting the defendant from starting or owning his own business); United States v. Morris, 1999 U.S. App. LEXIS 4194, at *2 (10th Cir. Mar. 16, 1999) (upholding an order prohibiting the defendant from engaging in any type of employment which involves the processing of credit applications, or the solicitation of investors or lenders); United States v. Choate, 101 F.3d 562, 566 (8th Cir. 1996) (upholding an order prohibiting the defendant from engaging in any type of employment which involves the processing of credit applications, or the solicitation of investors or lenders); United States v. Berridge, 74 F.3d 113, 114 (6th Cir. 1996) (upholding an order prohibiting the defendant from obtaining employment in the banking industry); United States v. Manogg, 1993 U.S. App. LEXIS 10899, at *3 (6th Cir. May 11, 1995) (upholding an order prohibiting the defendant from participating in or becoming a party to any real estate transaction or affiliated with any business entity at an executive or administrative level); United States v. Mills, 959 F.2d 516, 517 (5th Cir. 1992) (upholding an order prohibiting the defendant from working in the car sales business), reh'g denied, 1992 U.S. App. LEXIS 13939 (5th Cir. June 2, 1992); United States v. Tonry, 605 F.2d 144, 146 (5th Cir. 1979) (upholding an order prohibiting the defendant—a former Member of Congress—from running for office or engaging in political activity).
[Such restrictions are permitted] "only if [the court] determines that: (1) a reasonably direct relationship existed between the defendant's occupation . . . and the conduct relevant to the offense of conviction; and (2) imposition of such a restriction is reasonably necessary to protect the public because there is reason to believe that, absent such restriction, the defendant will continue to engage in unlawful conduct similar to that for which the defendant was convicted." 150

Congress has further ordered that occupational restrictions on convicted criminals should "involve[] no greater deprivation of liberty than is reasonably necessary" to promote criminal deterrence, protection of the public, and effective correctional treatment.151 This means that occupational restrictions may only be imposed "for the minimum time and to the minimum extent necessary to protect the public." 152 Furthermore, occupational restrictions must be "especially fine-tuned" so as not to impinge on the defendant's lawful behavior.153

More importantly for purposes of thinking about lifetime bar orders in civil cases, and especially in cease-and-desist proceedings, occupational restrictions in criminal cases expire no later than the date upon which the maximum sentence for the crime would have expired. In other words, if a sentence of incarceration could have run for a maximum of five years, the defendant's occupational restriction expires at the end of five years. There is no mechanism in criminal cases to impose any kind of lifetime occupational bar order. Thus, a defendant can be ordered not to engage in the used car business during the period of his supervised release, but he cannot be ordered to close or sell his dealership;154 a defendant can be ordered not to practice pharmacy during his period of probation but he cannot be ordered to surrender his pharmacy license.155 It is entirely reasonable to prohibit a lawyer from practicing law during his period of probation, so long as he is not ordered to surrender his license or required to resign from the bar.156 In each case, the idea is that the offender, having served out his term of probation or supervised release, should be free to enter the occupational marketplace without limitations other than those the market itself imposes.

Even where Congress has imposed an automatic occupational disqualification upon conviction of certain crimes (and note, Congress has not done so in the case of securities law violations), it has often recognized that significant intrusions into a defendant’s ability to seek meaningful work should be time-limited.157

150. United States v. Peterson, 248 F.3d 79, 83 (2d Cir. 2001) (quoting U.S. Sentencing Guidelines § 5F1.5); see also United States v. Doe, 79 F.3d 1309, 1319 (2d Cir. 1996) ("[W]e carefully scrutinize unusual and severe conditions, such as one requiring the defendant to give up a lawful livelihood.") (quoting United States v. Cutler, 58 F.3d 825, 838 (2d Cir. 1996)).
152. U.S. Sentencing Guidelines § 5F1.5(b).
156. United States v. Cutler, 58 F.3d 825, 838 (2d Cir. 1995).
157. See 29 U.S.C. § 504(a)(5) (2000) (establishing that the conviction for robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, or violent crimes bars
These inconsistencies, though probably not of constitutional proportions, do make one wonder about the necessity for a lifetime bar order except in the most extreme cases, or cases involving documented recidivism.\textsuperscript{158} There is certainly reason to wonder whether a lifetime bar order can possibly be appropriate in the context of a cease-and-desist proceeding, which was designed to deal with those inconsequential infractions unworthy of a litigated proceeding.\textsuperscript{159} Yet, that apparently is what Congress has authorized. As of now, here is the playing field on which the Commission will most likely be operating, with predictable results:

<table>
<thead>
<tr>
<th></th>
<th>Criminal Prosecution</th>
<th>Civil Enforcement Action</th>
<th>Cease-and-Desist Proceeding</th>
</tr>
</thead>
<tbody>
<tr>
<td>What Must Be Proved?</td>
<td>Guilt beyond a reasonable doubt, a “willful” violation</td>
<td>Liability by a preponderance of the evidence; unfitness by clear and convincing evidence</td>
<td>Liability by a preponderance of the evidence; unfitness by a preponderance of the evidence</td>
</tr>
<tr>
<td>The Standard for Imposing a Temporary Disability (“Suspension”)</td>
<td>“there is reason to believe that, absent such restriction, the defendant will continue to engage in unlawful conduct similar to that for which the defendant was convicted;” the disability must be narrowly drawn</td>
<td>“a reasonable likelihood of future misconduct”</td>
<td>“some risk” of future misconduct</td>
</tr>
<tr>
<td>The Standard for Imposing a Permanent Bar</td>
<td>Not permitted</td>
<td>“a reasonable likelihood of future misconduct”</td>
<td>“some risk” of future misconduct</td>
</tr>
</tbody>
</table>

the offender from serving as an officer, director, trustee, member of any executive board, business manager, or representative of any labor organization for at least three but no more than thirteen years); id. § 1111(a)(3) (2000) (establishing that the conviction for robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, or violent crimes bars the offender from serving as an officer, director, trustee, custodian, counsel, agent, employee or representative in any capacity of an employee benefit plan for at least three but no more than thirteen years); 33 U.S.C. § 569f (2000) (establishing that the conviction for intentionally affixing a label bearing “Made in America” inscription to a product that is not made in the United States and is used in a civil works project requires debarment for at least three but no more than five years).

\textsuperscript{158} Another area for possible exploration is the inconsistency in the sanctions imposed on regulated professionals when compared to the sanctions imposed on non-regulated individuals. Often, regulated professionals are sanctioned by the Commission for finite-and brief-periods, rather than barred for life, even when their misconduct has been “egregious” or even criminal. See, e.g., \textit{In re Wu}, Exchange Act Release No. 45694, 2002 SEC LEXIS 843, at *26-*27 (Apr. 4, 2002) (barring the defendant from association with a broker or dealer, but providing that he can reapply for association after two years, even though the defendant’s conduct was “reckless and egregious”); \textit{In re Quest Capital Strategies, Inc.}, Exchange Act Release No. 44935, 2001 SEC LEXIS 2147, at *29 (Oct. 15, 2001) (barring the defendant from association with a broker or dealer, but providing that he can reapply after one year, even though the defendant’s supervisory failures were “egregious,” and reflected “ab-dication of supervisory responsibility”); \textit{In re Rosenthal}, Exchange Act Release 40387, 1998 SEC LEXIS 1850, at *10 (Sept. 1, 1998) (barring the defendant from association from a broker or dealer, but providing that he can reapply after three years, even though the defendant’s conduct – for which he was convicted in a criminal prosecution – involved attempting to bribe a pension fund manager).

Commentators have also noted that many barred professionals effectively are able to continue working in the financial services industry even after being suspended or barred, merely by switching from one segment of the industry to another, for example, by working for an investment adviser rather than for a brokerage firm. See \textit{Heather Timmons & Mike McNamee, Banned for Life (Sort of)}, Bus. Wks., Mar. 3, 2003, at 112.

\textsuperscript{159} See \textit{supra} notes 67-99 and accompanying text.
The Lack of a Meaningful Safety Valve

At least in theory, a permanent bar order "is not necessarily an irrevocable sanction; upon application, the Commission, if it finds that the public interest no longer requires the applicant's exclusion from the securities business, may permit his return—usually subject to appropriate safeguards." This rule, applicable in cases of regulated professionals, should apply equally in cases of unregulated individuals. Had Congress acted consistently with its prior practice, the Sarbanes-Oxley Act would have contained some statutory guidelines for the lifting of lifetime bar orders. For example, Congress has directed that health care providers debarred from participating in the Medicare program may apply for reinstatement after the passage of three years, if they can provide "reasonable assurances that the types of actions which formed the basis for the original debarment have not recurred and will not recur." Labor union officials debarred from holding a union office following a criminal conviction may apply for reinstatement after the passage of three years by showing that the reinstatement "would not be contrary to the purposes of [the Labor-Management Reporting and Disclosure] Act." Banking officials debarred from involvement with insured depository institutions following a criminal conviction may apply for reinstatement at any time by showing that lifting the bar would be "in the interest of justice." At a minimum, the Commission should now articulate procedures and standards for seeking relief from lifetime bar orders, as it has done in connection with professionals barred from practicing before the Commission and regulated professionals barred from associating with regulated firms. Among other provisions, those procedures and standards should include an opportunity to seek relief from a lifetime bar after no more than eight years, the opportunity to present witnesses and build a complete record of the defendant's rehabilitation, and the possibility of some form of peer review or peer supervision, both before and after the lifting of the bar.

CONCLUSION

As many have noted, the Sarbanes-Oxley Act was a hasty piece of work. Haste is especially evident in the provisions governing the power to suspend or bar

166. The experiences of reinstated lawyers and doctors might provide guidance in the formulation of standards that would govern the process of lifting the bar. See Kimberly A. Lacey, Second Chances: The Procedure, Principles, and Problems With Reinstatement of Attorneys After Disbarment, 14 GEO. J. LEGAL ETHICS 1117 (2001).
securities law violators. We know that "unfitness" is now the standard upon which courts and the Commission may decide whether to enter a suspension or bar order. We do not know with any certainty, however, (i) what "unfitness" means; (ii) what distinguishes between unfitness sufficient to support a finite-term suspension order and the kind of unfitness necessary to support a lifetime bar order; (iii) what standard—"reasonable likelihood of future misconduct" or some lesser standard—will be required to support a suspension or bar order in the federal district courts; (iv) what standard—"some risk" of future misconduct or some higher standard—will be required to support a suspension or bar order in an SEC cease-and-desist proceeding; (v) how and under what circumstances defendants subject to a lifetime bar order may be eligible for a lifting of the bar; and (vi) what the in terrorem impact of the suspension and bar provisions will be on corporate executives.

Certainly, it is understood that "the new language will yield more aggressive use of the D&O bar sanction by the SEC and harsher results for individuals." 167 It is also anticipated that the SEC's position in settlement discussions will be strengthened. These advantages may be lost, however, if the Commission itself does not use its new powers in a reasonable way, either through judicious practice or, better yet, the enactment of reasonable rules and regulations which will provide the clarifications that Congress, in its haste, omitted.