

2002

The SEC's Suspension and Bar Powers in Perspective

Jayne W. Barnard

William & Mary Law School, jwbarn@wm.edu

Repository Citation

Barnard, Jayne W., "The SEC's Suspension and Bar Powers in Perspective" (2002). *Faculty Publications*. 310.
<https://scholarship.law.wm.edu/facpubs/310>

Copyright c 2002 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/facpubs>

Does Corporate Law Protect the Interests of Shareholders and Other Stakeholders?

The SEC's Suspension and Bar Powers in Perspective

Jayne W. Barnard*

Enron has brought about demands from many quarters to grant the Securities and Exchange Commission (SEC) new powers. Among the powers the SEC now seeks is the power to bar or suspend securities law violators from serving as an officer or director of any public company. Currently, the law assigns this power only to federal district courts. In this Essay, Professor Barnard traces the history of the current law, examining why Congress has expressly withheld suspension and bar powers from the SEC. She then argues that the courts have exercised their suspension and bar powers wisely, and that recent developments do not compel any legislative change. Finally, recognizing that Congress may well be persuaded that new legislation is necessary, she provides model statutory language that could be used for such a change.

I.	THE CURRENT STATUTORY REGIME	1255
II.	THE COURTS' APPROACH TO THE STATUTE AS WRITTEN	1259
	A. <i>The Commission's Successful Application of the Statute to Deserving Defendants</i>	1260
	B. <i>The Defendants Who "Got Away"</i>	1264
III.	THE REAL MOTIVATION BEHIND THE REFORM INITIATIVE: "EASY STREET"	1267
IV.	WHAT AN SEC ADMINISTRATIVE SUSPENSION AND BAR PROVISION OUGHT TO INCLUDE	1269
V.	CONCLUSION.....	1273

Recently, the Securities and Exchange Commission's (SEC) Director of the Division of Enforcement, Stephen M. Cutler, suggested that the Commission would soon be seeking legislative authority to bar those offenders found liable for securities laws violations from serving

* James Goold Cutler Professor of Law, The College of William & Mary School of Law, Williamsburg, Virginia. Thanks to Doug Branson for creating the opportunity for me to express my views on this unfolding topic, to Jeremy Eglen and Craig Grider, who spent part of their spring break tracking down references for inclusion in the Essay and to the student editors of the *Tulane Law Review* for outstanding editorial work under significant time constraints.

as an officer or director of any public company.¹ Cutler argued that the existing statutory scheme, which limits the authority to impose such a bar to federal judges in litigated proceedings, is inadequate.² He further suggested that the case law currently governing bar orders has imposed an “unreasonably high” standard of proof on the Commission.³

I would like to suggest that the standard of proof for barring an offender from serving as an officer or director is high for several reasons, having to do with concerns that the SEC rarely considers. These concerns have to do with the right of citizens, even convicted felons, to seek work commensurate with their skills; the right of those who are found to have violated the law, even the securities laws, to be subject to punishment proportionate to their wrongdoing; the right of defendants in civil cases not to be subject to “punishment” at all; and the right of shareholders under applicable state law to define the composition of the board that will represent their interests.

Congress had these rights in mind when it enacted the existing statutory scheme governing bar orders.⁴ Congress had these rights in mind when it expressly declined to extend to the Commission the authority to enter such orders unilaterally. Congress anticipated correctly, in hindsight, that the Commission would overrely on the bar order rather than crafting more carefully tailored orders and would often seek to bar defendants for whom alternative remedies would be more appropriate. Thus, we should not be surprised that Congress reserved for the courts the power to enter bar orders and set a high threshold, “substantial unfitness,” for entering such orders.

The federal courts have understood Congress’s intentions in this area. In considering the SEC’s requests for bar orders over the last decade, some federal courts have said “no” to the Commission’s overreaching requests. These courts have recognized that many federal securities law offenders are unlikely to recidivate and that outside of a

1. Stephen M. Cutler, *Remarks at the Glasser LegalWorks 20th Annual Federal Securities Institute*, at www.sec.gov/news/speech/spch538.htm (Feb. 15, 2002).

2. *Id.*

3. *Id.*

4. The scheme may be found at 15 U.S.C. § 78u(d)(2) (2000), which provides:

In any proceeding under paragraph (1) of this subsection, the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as it shall determine, any person who violated section 78j(b) of this title or the rules or regulations thereunder from acting as an officer or director of any [public company] if the person’s conduct demonstrates substantial unfitness to serve as an officer or director of any such issuer.

criminogenic milieu, many offenders can make significant contributions to legitimate businesses. In some cases, therefore, these courts have declined to enter any form of bar order, and in other cases they have imposed a more limited order (in terms of duration or scope) than that sought by the SEC. A thoughtful reading of these decisions reveals that they are based on a well-developed evidentiary record and a careful application of the relevant factors.

Nevertheless, the SEC now argues that the courts have employed "a burdensome and overly restrictive test"⁵ in securities cases. As a result, the Commission would now like to "improve" the existing statutory regime. It would like to seize from the courts the power to enter its own occupational bar orders against securities law offenders. It happily sees in the Enron debacle an opportunity to achieve this goal.

This Essay argues that Congress should resist the SEC's efforts to expand its powers in this area.⁶ It goes on to suggest that, if Congress cannot resist the SEC's blandishments, then Congress should be careful to specify the circumstances under which (and the procedures by which) a suspension or bar order may legitimately be entered by the SEC.

I. THE CURRENT STATUTORY REGIME

The origins of the existing statutory scheme can be traced to the National Commission on Fraudulent Financial Reporting (the Treadway Commission), which in 1987 recommended that "the SEC should seek explicit statutory authority to bar or suspend corporate officers and directors involved in fraudulent financial reporting from future service in that capacity in a public company."⁷

The SEC embraced this recommendation, and in 1989, the Securities Law Enforcement Remedies Act of 1989 (1989 bill) was

5. Cutler, *supra* note 1.

6. As this Essay is written, the Commission is also promoting a number of other enhancements to its authority, which are not addressed here. These enhancements include elimination of the scienter requirement under rule 10b-5, the development of a powerful new corporate governance "self-regulatory organization" that would be overseen by the Commission, increased penalties, new definitions of insider trading, and possible revisions to the Private Securities Litigation Reform Act of 1995. See Jacob M. Schlesinger, *O'Neill Weighs Stricter Corporate Penalties*, WALL ST. J., Feb. 25, 2002, at A3.

7. Jayne W. Barnard, *The Securities Law Enforcement Remedies Act of 1989: Disenfranchising Shareholders in Order to Protect Them*, 65 NOTRE DAME L. REV. 32, 32 (1989) (quoting Report of the National Commission on Fraudulent Financial Reporting 66 (1987)).

introduced.⁸ Among other provisions, the 1989 bill provided that the SEC could, in administrative proceedings under section 15(c)(4) of the Exchange Act, enter an order against “any person found to have failed to comply, or to have been a cause of the failure to comply” with the reporting requirements of the Act, barring or suspending them from serving as an officer or director of any public company.⁹ In addition, the 1989 bill sought express statutory authority to seek such orders in litigated proceedings.

At the time, few critics challenged the notion that the SEC could seek a court-ordered removal of a corporate officer or director, or a corporation-specific suspension or bar, even without express statutory authority. Indeed, the SEC had often sought such court orders and embodied such orders in litigation settlements.¹⁰ Moreover, in a few compelling cases, the SEC had sought more aggressive court orders, including orders that would either temporarily or permanently disqualify an offender from serving as an officer or director of any public company. These draconian orders (known as “comprehensive suspensions or bar orders”) had also been embodied in litigation settlements.¹¹ Thus, there was little objection to memorializing these practices in legislation. Critics did argue, however, that

permitting the SEC, as opposed to the federal district courts, to compel removal or disqualification of corporate officers and directors—either in a corporation-specific context or with a comprehensive order—would grant the Commission unwarranted power and would distort its proper role in maintaining the integrity of the capital markets.¹²

Criticisms focused on the SEC’s “adjudicatory competence, potential for abuse of discretion and the question of whether the suspension and bar power [would permit] the SEC to ‘punish’ individuals (which is constitutionally impermissible for a regulatory agency) or merely to regulate their conduct.”¹³

These criticisms were embraced by the Business Law Section of the American Bar Association, which vigorously opposed the 1989 bill. As a result of the section’s efforts, the bill was significantly amended. “The amended bill narrowed the suspension and bar provisions by deleting the SEC’s authority to impose executive

8. *Id.* at 33.

9. *Id.* at 34 (quoting H.R. 975, 101st Cong. (1989)).

10. *See id.*

11. *See id.*

12. *Id.*

13. *Id.* at 35-36 (footnote omitted).

suspension or bar orders on its own and by limiting the bill's application in litigated matters to instances of 'scienter-based fraud.'"¹⁴

Thus, when the Securities Enforcement Remedies and Penny Stock Reform Act (Remedies Act) finally became law in 1990, Congress had unequivocally rejected the initial scheme by which the SEC, as well as the federal courts, would have enjoyed suspension and bar authority. As it is now, the SEC has limited cease-and-desist authority¹⁵ while the federal courts can employ a hierarchy of remedies that deal with both short-term and long-term remedial goals.

In the first instance, courts can enter a number of types of injunctions, each requiring a distinctive and exacting standard of proof. The simplest form of injunctive relief is the disgorgement order, in which the defendant is required to disgorge her profits, sometimes accompanied by a civil penalty.¹⁶ Next in complexity is the misconduct-specific injunction, in which the defendant is ordered not to repeat the type of behavior that is the subject of the current proceeding.¹⁷ Next comes the more generalized, yet still topic-specific injunction, in which the defendant is ordered not to engage in any form of misconduct similar to that involved in the current proceeding.¹⁸ Finally, and most ambitiously, comes the omnibus "obey-the-law" injunction, in which the defendant is prohibited from violating any portion of the federal securities laws, on pain of contempt and additional sanctions.¹⁹

14. Jayne W. Barnard, *When Is a Corporate Executive "Substantially Unfit to Serve"?*, 70 N.C. L. REV. 1489, 1494 (1992).

15. 15 U.S.C. § 78u-3 (2000).

16. *See, e.g.*, SEC v. Palmisano, 135 F.3d 860, 863 (2d Cir. 1998) (upholding \$9.2 million disgorgement order plus a civil penalty of \$500,000); SEC v. Chester Holdings, Ltd., 41 F. Supp. 2d 505, 529-30 (D.N.J. 1999) (ordering disgorgement of \$2,106,185 but declining to order payment of a civil penalty); SEC v. Farrell, No. 95-CV-6133T, 1996 WL 788367, at *11 (W.D.N.Y. Nov. 6, 1996) (ordering disgorgement of \$32,187.50 and payment of a civil penalty in an equivalent amount).

17. *See, e.g.*, SEC v. First City Fin. Corp., 890 F.2d 1215, 1229 (D.C. Cir. 1989) (affirming an injunction against further violations of section 13(d)).

18. *See, e.g.*, SEC v. Poirier, 140 F. Supp. 2d 1033, 1047 (D. Ariz. 2001) (enjoining the defendant from future violations of sections 17(a) and 5(c) of the Securities Act of 1933, sections 7(f) and 10(b) of the Securities Exchange Act of 1934, rule 10b-5 promulgated under the Securities Exchange Act of 1934, and regulation X); SEC v. Dimensional Entm't Corp., 518 F. Supp. 773, 774 (S.D.N.Y. 1981) (enjoining the defendant from violating sections 5(a), 5(c), and 17(a) of the Securities Act of 1933, section 10(b) of the Securities Exchange Act of 1934, and rules 10(b)-5 and 10(b)-6 thereunder).

19. *See, e.g.*, SEC v. Chester Holdings, Ltd., 41 F. Supp. 2d 505, 530 (D.N.J. 1999) (entering an obey-the-law injunction); SEC v. Antar, 15 F. Supp. 2d 477, 533 (D.N.J. 1998) (entering on obey-the-law injunction against all defendants); SEC v. Falbo, 14 F. Supp. 2d 508, 529 (S.D.N.Y. 1998) (entering an obey-the-law injunction against defendant Falbo).

All of these injunctions except the disgorgement injunction depend on the government's ability to demonstrate that, in the absence of an injunction, there is a reasonable likelihood of future violations.²⁰ This requirement has been stringently applied to the SEC's (and other agencies') requests for injunctions.²¹ Some of the Commission's frustration in this area may derive from the fact that, even aside from its ability to seek suspension and bar orders, its efforts to secure broad injunctive relief have sometimes been rebuffed for lack of evidence.²²

And it is important to note that misconduct-specific injunctions, more generalized injunctions, and "obey-the-law" injunctions were already available to the SEC when the Remedies Act was passed. One could reasonably conclude, therefore, that the suspension and bar authority embodied in the Act was created to provide new tools where the existing tools had proven inadequate.²³ Stated another way, one could reasonably conclude that suspension and bar orders were intended for use only where the court was convinced that the other forms of injunctions would likely be insufficient. This would mean that the standard for imposing a suspension or bar order would necessarily be different—and higher—than the standard for imposing a garden-variety injunction. Specifically, suspension and bar orders would be entered only in cases of recidivism or truly egregious misconduct. This is the position that was taken by the SEC in

20. SEC v. Monarch Fund, 608 F.2d 938, 943 (2d Cir. 1979); SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 99-100 (2d Cir. 1978).

21. See Daniel J. Morrissey, *SEC Injunctions*, 68 TENN. L. REV. 427, 453-54, 456-58 (2001) (tracing the history of SEC injunctions generally, and the history of the "likelihood of future violations" requirement specifically).

22. See, e.g., SEC v. Pros Int'l, Inc., 994 F.2d 767, 769 (10th Cir. 1993) (upholding denial of injunction where there was "no evidence that future violations are likely"); SEC v. Yun, 148 F. Supp. 2d 1287, 1294 (M.D. Fla. 2001) (denying the SEC's request for an injunction because future violations were unlikely as actions were isolated, conduct was not egregious, and participants regretted their involvement); 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 SEC action was based on "isolated, as opposed to recurrent, violations of the securities laws"); *Falbo*, 14 F. Supp. 2d at 529 (enjoining one defendant but declining to enjoin the other where the Commission failed to demonstrate as to the second that it was reasonably likely that he would commit future violations). One commentator has opined that courts in recent years have become increasingly stringent in their requirements for injunctions in SEC cases. See David Franklin Levy, Comment, *The Impact of the Remedies Act on the SEC's Ability to Obtain Injunctive Relief*, 44 AM. U. L. REV. 645, 655-71 (1994).

23. "The Senate report [accompanying the Remedies Act] indicates that the purpose of Pub. L. No. 101-429 was to 'provide the agency with a broader range of remedies to protect investors and maintain the integrity of the nation's security markets.'" United States v. Merriam, 108 F.3d 1162, 1164 (9th Cir. 1997) (quoting S. REP. NO. 101-337 (1990)).

describing how it intended to use its new remedial tool.²⁴ It is also the position most federal courts have taken in applying the Remedies Act.

II. THE COURTS' APPROACH TO THE STATUTE AS WRITTEN

Courts are empowered to enter a suspension or bar order when the government is able to demonstrate the defendant's "substantial unfitness to serve." There was little useful legislative history to this important phrase. Courts, however, have consistently employed a six-part test in determining whether such an order is appropriate.

The test derives from a law review article published in 1992.²⁵ The first court to construe the statute adapted the proposal contained in that article and considered the following six factors in deciding whether to make a "substantial unfitness" finding: "(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."²⁶

The most significant and thoughtful articulation of the six-part test emerged two years later from the United States Court of Appeals for the Second Circuit in *SEC v. Patel*.²⁷ While the court recognized the six-part test as "useful in making the unfitness assessment," it went on to caution that

[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

24. See Barnard, *supra* note 14, at 1510 ("In lobbying for the Remedies Act, both SEC Chairman Richard Breeden and his predecessor, David Ruder, assured Congress that the Commission would seek executive suspension and bar orders only in cases of 'egregious' misconduct or of repeated violations of the securities laws.").

25. *Id.*

26. *SEC v. Shah*, No. 92CIV1952, 1993 WL 288285, at *7 (S.D.N.Y. July 28, 1993). This formulation is very similar to the test employed by the SEC when deciding whether to suspend or bar a broker or other financial professional in administrative proceedings before the Commission. When the Commission determines administrative sanctions, it considers the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

In re Fundamental Portfolio Advisors, Inc., Initial Decision, Release No. ID-180, 2001 WL 66344, at *21 (Jan. 29, 2001) (quoting *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd*, 450 U.S. 91 (1981)).

27. 61 F.3d 137 (2d Cir. 1995).

discretion in deciding whether to impose a bar to employment in a public company.²⁸

The six-part test for determining whether to enter a suspension or bar order has now been embraced by every court to have considered the matter. The test is similar to the test employed to determine whether other forms of injunctive relief should be ordered in securities cases, especially in its emphasis on the government's need to prove the likelihood of future misconduct.²⁹ As the court in *Patel* correctly observed, the likelihood of future misconduct is "always an important element in deciding whether [to order] a lifetime ban."³⁰ And, as it has done in cases involving other types of injunctive relief,³¹ the Second Circuit was careful to note that, in the absence of a record of recidivism or defiance of previous injunctive orders against the defendant, the district court must "articulate the factual basis for a finding of the likelihood of recurrence."³² This is often a hard case to make, as the science of predicting white-collar recidivism is inexact, at best.³³ Nonetheless, the Commission has consistently been successful in making that case, as the decisions in the following Part attest.

A. The Commission's Successful Application of the Statute to Deserving Defendants

Since its passage in 1990, the Remedies Act suspension and bar provision has been invoked successfully on many occasions. An early decision in the Second Circuit, for example, affirmed comprehensive bar orders against the legendary scofflaw Victor Posner and his son, upholding the district court's finding that the defendants had "committed securities law violations with a 'high degree of scienter' and that their past securities law violations and lack of assurances against future violations demonstrated that such violations were likely to continue."³⁴ In *SEC v. First Pacific Bancorp*, the United States

28. *Id.* at 141.

29. *See supra* note 23 and accompanying text.

30. 61 F.3d at 141.

31. *See, e.g.*, *United States v. Carson*, 52 F.3d 1173, 1184 (2d Cir. 1995) (noting the distinction between cases involving "systematic wrongdoing" and those involving an "isolated occurrence" in determining whether an injunction against future labor racketeering would be appropriate).

32. 61 F.3d at 142.

33. *See* Barnard, *supra* note 14, at 1517-19 nn.152-161 (summarizing the social-science literature regarding white-collar recidivism).

34. *SEC v. Posner*, 16 F.3d 520, 521-22 (2d Cir. 1994). Based on its review of the Posners' "long and notorious history of engaging in self-dealing and corporate waste to the detriment of the public shareholders of companies under their control," the district court

Court of Appeals for the Ninth Circuit similarly affirmed a comprehensive bar order where the defendant Sands, the chairman of the board, CEO, and corporate counsel of a bank holding company, had orchestrated a complex scheme that had brought down a federally insured bank with a loss of \$688,000 to investors.³⁵

These two cases represent the two most compelling scenarios for the imposition of a comprehensive bar order, the recidivist (Posner) and the big-time defrauder (Sands). They each are excellent templates.

A more recent case, *SEC v. Farrell*,³⁶ shows yet another successful use of the suspension and bar statute. In *Farrell*, the defendant had engaged in insider trading activities while serving on the board of a publicly owned bank.³⁷ The defendant was prosecuted criminally and incarcerated.³⁸ The Commission then sought both an injunction prohibiting further violations of Rule 10b-5 and also a comprehensive bar order.³⁹ The former was granted; the latter denied, at least in part. The court, recognizing the flexibility embodied in the statute, stated:

Based upon the record, a permanent officer or director bar is not appropriate. Farrell's securities violations were serious and he did engage in fraudulent conduct in the hopes that his illegal activities would not be discovered. However, upon release from prison, he should not be barred from holding *any* other officer or director positions. Farrell is a talented executive and a permanent bar would effectively prevent him from using those talents to rebuild his life. *However, in view of Farrell's offenses, he is permanently barred from holding an officer/director position with any banking or financial institutions.*⁴⁰

concluded that "one would be hard-pressed to find more worthy candidates to be barred from serving as officers and directors." *SEC v. Drexel Burnham Lambert Inc.*, 837 F. Supp. 587, 603, 614-15 (S.D.N.Y. 1993).

35. 142 F.3d 1186, 1188-89 (9th Cir. 1998). The lower court in this case found that the defendant had

caused the collapse of a federally insured bank; he attempted to stymie banking regulators from doing their jobs; he is a recidivist; and the fraudulent conduct he committed occurred while serving in a corporate or fiduciary capacity. The district court also found that Sands had a high level of scienter, that he engaged in ongoing and recurrent violations, that he had failed to assume any responsibility for his violations of law, that he utterly failed to recognize the wrongful nature of his conduct, and that there was a strong likelihood of future violations.

Id. at 1193-94 (quotations omitted).

36. No. 95-CV-6133T, 1996 WL 788367 (W.D.N.Y. Nov. 6, 1996).

37. *Id.* at *1-*3.

38. *Id.* at *4.

39. *Id.*

40. *Id.* at *8 (citation omitted and second emphasis added).

This decision illustrates that, even within the suspension and bar provision, there is a hierarchy of options available to the courts. One might describe the range of options as follows, with the least invasive type of injunction listed at the bottom of the chart and the most invasive type listed at the top. The result in the *Farrell* case is highlighted, indicating that the order in that case was a significant and meaningful one.

A permanent comprehensive bar order	
A limited-term comprehensive suspension order	
A permanent functional bar order (e.g., the offender may not serve as the chief financial officer of any public company)	A permanent industry-wide bar order (e.g., the offender may not serve as an officer or director of any public company in the financial services industry)
A limited-term functional suspension order	A limited-term industry-wide suspension order
A permanent corporation-specific bar order	
A limited-term corporation-specific suspension order	

Another successful case, resulting in the entry of an order at an even higher level of invasiveness than *Farrell* is *SEC v. McCaskey*.⁴¹ In that case, the defendant was engaged in market manipulation. He ultimately pleaded guilty to one count of securities fraud and was sentenced to five years probation, a \$30,000 fine, and a \$100,000 special assessment.⁴² In the SEC civil enforcement action that followed, the Commission sought a disgorgement order, civil monetary penalties, and both an injunction against future statutory violations and a comprehensive bar order.⁴³ In its opinion, the district court found that the issues of disgorgement and monetary penalties were not ripe for decision on a motion for summary judgment, but entered an injunction against future violations of the securities laws.⁴⁴ Reviewing the defendant's behavior and current circumstances, the court also concluded that McCaskey was substantially unfit to serve as an officer

41. No. 98CIV6153, 2001 WL 1029053 (S.D.N.Y. Sept. 6, 2001).

42. *Id.* at *1.

43. *Id.* at *5-*7.

44. *Id.*

or director.⁴⁵ It therefore suspended him from serving as an officer or director of any public company for a period of six years.⁴⁶

Two additional cases may be cited in which, unlike in *Farrell* and *McCaskey*, the SEC got everything it asked for. In *SEC v. Softpoint, Inc.*, the Commission sought a permanent bar order against the chief operating officer of a publicly held company who had orchestrated a series of securities laws violations including earnings manipulation, the sale of unregistered stock, and the filing of numerous misleading 10-Ks, 10-Qs, and registration statements.⁴⁷ Even though the defendant was a first-time offender, the court had no difficulty entering an injunction permanently enjoining him from future violations of the securities laws and also permanently barring him from serving as an officer or director of a public company.⁴⁸

In *SEC v. Zubkis*, the Commission sought a permanent bar order against an executive who had presided over a "boiler room" operation, through which dozens of investors purchased worthless, unregistered securities.⁴⁹ Noting that "Mr. Zubkis violated several federal securities laws and did so with scienter [and that he] did not commit an isolated infraction, but instead committed numerous violations over the course of several years,"⁵⁰ the court here, too, found no difficulty in entering a permanent bar order.⁵¹

In addition to these reported cases, the SEC has been successful in a number of unreported cases⁵² and has repeatedly been able to settle

45. *Id.* at *7.

46. *Id.*

47. 958 F. Supp. 846, 851, 866-67 (S.D.N.Y. 1997), *aff'd*, 159 F.3d 1348 (2d Cir. 1998).

48. *Id.* at 866-67. The defendant was also ordered to disgorge \$474,416 plus prejudgment interest of \$61,155; in addition, he was assessed a \$100,000 civil penalty. *Id.* at 867-68; *see also* SEC v. Chester Holdings, Ltd., 41 F. Supp. 2d 505, 531 (D.N.J. 1999) (entering a comprehensive bar order).

49. No. 97CIV8086, 2000 WL 218393, at *1 (S.D.N.Y. Feb. 23, 2000).

50. *Id.* at *10.

51. The court found:

Over a period of several years, Mr. Zubkis, as head of Z3, knowingly orchestrated a securities fraud that netted several million dollars and from which he stood to profit personally. The misrepresentations in this case were egregious. This is, moreover, not the first time that Mr. Zubkis has been found in violation of securities-related rules.

Id. at *11.

52. *See, e.g.*, SEC v. Hollywood Trenz, Inc., Accounting and Auditing Enforcement Act Release No. 17204, 76 SEC Docket 335 (Oct. 25, 2001) (reporting disposition of a civil enforcement action in which the United States District Court for the District of Columbia had entered a permanent bar order against the defendant); *In re* Silver, Exchange Act Release No. 34-38914, 65 SEC Docket 372 (Aug. 11, 1997) (reporting that, in a prior civil action, the

many of its litigated cases with consent decrees in which suspension or bar orders played a prominent role.⁵³ This success in the settled cases may be due to the SEC's talent for driving a hard bargain.⁵⁴ It is at least as likely that these cases were settled, and suspension or bar orders were consented to, because the defendants were deserving of those sanctions and the reported cases suggested to their lawyers that if they resisted the terms presented, the bar would have been imposed by a court. Either way, in assessing the utility of the current statutory scheme, it is as important to look at the settled cases as the decided ones, virtually all of which have been favorable to the SEC.

B. *The Defendants Who "Got Away"*

The SEC's Mr. Cutler suggests that the successful prosecutions described in the foregoing Part are the exceptions. He complains that, "when it comes to O and D bars, the courts have simply lost their way."⁵⁵ He points to the *Farrell* and *McCaskey* cases as examples of

United States District Court for the Central District of California had entered a permanent bar order against the defendant).

53. See, e.g., SEC v. Barber, Accounting and Auditing Enforcement Act Release No. 17314, 2002 WL 54148, at *1 (Jan. 15, 2002) (permanently barring former CFO from acting as an officer or director of any public company); SEC v. Caserta, Accounting and Auditing Enforcement Act Release No. 17115, 75 SEC Docket 1772 (Sept. 5, 2001) (permanently barring a former CEO and CFO); SEC v. Iteq Corp., Accounting and Auditing Enforcement Act Release No. 16841, 73 SEC Docket 3194 (Dec. 26, 2000) (permanently barring former CEO who agreed to disgorge \$1.4 million); SEC v. Iteq Corp., Accounting and Auditing Enforcement Act Release No. 16708, 73 SEC Docket 859 (Sept. 18, 2000) (permanently barring defendant Neal who agreed to disgorge \$2,300,000 and pay a \$200,000 civil penalty); SEC v. Mitchellette, SEC Release No. 16553, 72 SEC Docket 1102 (May 15, 2000) (permanently barring the company's founder); SEC v. Buchanan, Accounting and Auditing Enforcement Act Release No. 16518, 72 SEC Docket 596 (Apr. 18, 2000) (permanently barring the defendant); SEC v. Strauss, SEC Release No. 16360, 71 SEC Docket 216 (Nov. 17, 1999) (permanently barring the defendant); SEC v. United Fire Technology, Inc., SEC Release No. 16271, 70 SEC Docket 1191 (Sept. 2, 1999) (permanently barring defendant Kamerling who agreed to disgorge \$1,066,515); SEC v. Drabinsky, SEC Release No. 16022, 1999 WL 10253, at *1 (Jan. 13, 1999) (permanently barring the defendant Eckstein); SEC v. DiMauro, SEC Release No. 16017, 1999 WL 3456, at *1 (Jan. 7, 1999) (suspending the defendant DiLorenzo for ten years); SEC v. DiMauro, Accounting and Auditing Enforcement Act Release No. 15874, 67 SEC Docket 2171 (Sept. 9, 1998) (permanently barring the defendant Di Mauro); SEC v. Safronchik, Accounting and Auditing Enforcement Act Release No. 15833, 67 SEC Docket 1651 (Aug. 5, 1998) (permanently barring the defendant); SEC v. Peltz, Accounting and Auditing Enforcement Act Release No. 15657, 66 SEC Docket 1343 (Mar. 3, 1998) (permanently barring the defendant); SEC v. Kilgore, SEC Release No. 15345, 64 SEC Docket 1107 (Apr. 23, 1997) (permanently barring the defendant).

54. See Mitchell E. Herr, *Does the SEC Demand More in Settlement Than It Can Get at Trial?*, Sec. Reg. L. Rep. (CCH) 607 (Apr. 23, 2001) (noting a "pervasive pattern in which the SEC seeks harsher sanctions in settlement than it is likely to get at trial").

55. Cutler, *supra* note 1.

the courts' unwarranted generosity in this area. He also cites the decision in the *Patel* case,⁵⁶ which, upon close reading, hardly seems to be shocking. But even if one believes *Patel* was incorrectly decided, one arguably questionable decision does not represent a system that is broken and needs fixing.

Patel, like the *Farrell* case, involved insider trading by the defendant.⁵⁷ Not only had the defendant engaged in securities fraud, he had done so with knowledge that the company's stock price had been artificially inflated based on false documentation he had submitted to the Food and Drug Administration.⁵⁸ At the end of the day, he pleaded guilty to conspiracy to defraud the FDA, though he was not prosecuted criminally for the insider trading.⁵⁹ He had, however, settled a securities fraud class action claim with a payment (in stock) valued at \$3 million.⁶⁰ In the civil enforcement proceeding brought against him by the SEC, Patel "conceded that he had violated the antifraud provisions and agreed that a permanent injunction against future violations would be appropriate."⁶¹ However, he resisted imposition of a bar on his service as an officer or director of any public company.⁶² The district court ruled against him.⁶³

On appeal, the court reviewed with some care the findings below under the six-part test:

Applying the factors suggested by Professor Barnard, the district court found: that Patel's violations were not egregious in comparison with those of others and in view of the size of the loss avoided; that Patel was a first-time offender; that in his position as officer and director of Par, Patel allowed the false Application to be submitted and obstructed the FDA investigation of the Application by providing a "switched sample" of Maxzide to an FDA inspector; that Patel "showed some scienter in his actions, although he did not engage in clandestine trading"; that he was the sole economic beneficiary of his insider trading; and that, because he was a founder of Par and abused his position as officer and director, "the likelihood of future misconduct is sufficient to warrant the imposition of the injunctive relief requested."⁶⁴

56. SEC v. Patel, 61 F.3d 137 (2d Cir. 1995).

57. *Id.* at 138.

58. *Id.*

59. *Id.* at 139.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 141.

The court then focused on the record regarding the defendant's likelihood of future misconduct:

The only findings that the district court made in this regard were that "Patel was a founder of Par and used his position as an officer and director to engage in misconduct." This is merely a general statement of events and can in no way justify the prediction that future misconduct will occur.⁶⁵

Finally, the court took note of the hierarchical nature of the suspension and bar provision and the possibility that some form of suspension order short of a lifetime bar might be appropriate:

[T]he governing statute provides that a bar on service as an officer or director that is based on substantial unfitness may be imposed "conditionally or unconditionally" and "permanently or for such period of time as [the court] shall determine." We take these provisions to suggest that, 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.⁶⁶

The case was then remanded.⁶⁷ The defendant's lawyer reports that the case was settled soon thereafter, with the defendant agreeing to pay less than originally ordered, in exchange for the imposition of a lifetime bar.⁶⁸

Only one other published opinion could possibly support the Commission's desire for a change in the suspension and bar statute. That case, *SEC v. Shah*, is the only published opinion in which a federal court has denied in its entirety the Commission's request for a suspension or bar order.⁶⁹ (It was also the very first case in which the "substantial unfitness" language was construed by a court.)

Shah involved the former president of a generic drug company who was involved in a scheme to bribe FDA examiners in order to get the company's products approved for distribution.⁷⁰ During the period when the company was paying the "illegal gratuities," the defendant

65. *Id.*

66. *Id.* at 142 (alteration in original).

67. *Id.*

68. E-mail from Michael J. Resko to Jayne W. Bernard, Apr. 4, 2002 (on file with author).

69. No.92CIV1952, 1993 WL 288285, at *1 (S.D.N.Y. July 28, 1993).

70. *Id.*

was selling his stock.⁷¹ After the story broke, the defendant was prosecuted criminally for paying the gratuities but not for insider trading.⁷² He pled guilty. He settled a private civil action for \$35,000, agreed to testify against two of his codefendants, and then was sued by the SEC in an enforcement action in which the Commission sought a comprehensive bar.⁷³

After ordering a disgorgement of \$119,053 (plus prejudgment interest), the court declined to enter the requested bar order.⁷⁴ The court noted that "the loss . . . avoided through [the defendant's] illegal sales . . . is relatively small. Thus, his violation of the securities laws should not be considered 'egregious.'"⁷⁵ In addition, the court found that Shah was a first-time offender, that his degree of scienter was "not . . . very high," and that the "likelihood of future misconduct appears relatively slight."⁷⁶ On the basis of these findings—and especially in light of the collateral penalties already imposed on the defendant—the court denied the SEC's request for a bar order.⁷⁷ The SEC did not appeal the *Shah* decision.

Thus, it would seem that the SEC's dissatisfaction with the state of the law governing suspensions and bars rests largely on the decision in *SEC v. Shah*, which it declined to appeal, and the thoughtful approach to the statute evidenced by the court of appeals in *United States v. Patel*, a case which the Commission ultimately won.

In every other reported decision, and in unreported ones as well, the SEC has been successful in its efforts to secure meaningful remedies. It is thus difficult to see anything in this record justifying the Commission's current anxiety over the Remedies Act.

III. THE REAL MOTIVATION BEHIND THE REFORM INITIATIVE: "EASY STREET"

One might suggest that it is Enron opportunism, rather than a principled disagreement with Congress or the courts, that is driving the Commission's current legislative agenda. It is understandable, however, that the Commission would prefer to have unilateral power to suspend or bar offenders, rather than waiting for (and in some respects

71. *Id.*

72. *Id.* at *2.

73. *Id.*

74. *Id.* at *7.

75. *Id.* (citations omitted).

76. *Id.*

77. *Id.*

paying for) the federal courts to do so. Certainly, it would be more efficient to assign this power to an administrative process than to a judicial process.

In addition, federal courts over the last decade have repeatedly legitimated bar orders entered by administrative agencies. In response to claims that such orders represent "punishment," for example, with implications under the Double Jeopardy Clause, courts have consistently held that occupational bars are not "punitive" but merely "remedial" in nature.⁷⁸ Courts have rejected claims that administrative agencies ought not to impose a lifelong bar unless they can show that it is the least restrictive means of protecting the public.⁷⁹ Courts have limited the due process rights of persons facing a summary debarment order from an administrative agency.⁸⁰

In other words, the federal courts have seldom rejected or reversed bar orders entered by administrative agencies. There are several other very practical reasons, though, why the SEC is eager to add suspension and bar powers to its existing cease-and-desist powers. In a nutshell, those reasons are (1) a lower standard of proof than required in court proceedings; (2) simplified procedures; (3) less onerous evidentiary requirements; (4) no requirement to show a reasonable likelihood of future misconduct; and (5) a sense of greater influence and control over the process. The recent Commission decisions involving KPMG Peat Marwick LLP illustrate the appeal of unilateral action as compared to the more burdensome process of seeking injunctive relief.⁸¹

78. See, e.g., *Hudson v. United States*, 522 U.S. 93, 117 (1997) (holding that an administrative debarment of banking officials does not constitute punishment); *Cox v. Commodity Futures Trading Comm'n*, 138 F.3d 268, 272-74 (7th Cir. 1998) (holding that an administrative sanction barring a commodities trader from trading in the commodities markets for life does not constitute punishment); *United States v. Merriam*, 108 F.3d 1162, 1165 (9th Cir. 1997) (holding that a disciplinary sanction barring a brokerage firm employee from associating with any NASD member for life does not constitute punishment); *United States v. Hatfield*, 108 F.3d 67, 69 (4th Cir. 1997) (holding that a twenty-six-month debarment of a federal contractor does not constitute punishment); *United States v. Borjesson*, 92 F.3d 954, 956 (9th Cir. 1996) (holding that indefinite debarment from participating in HUD-sponsored programs does not constitute punishment). At least one critic has challenged cases such as these, arguing that the permanent deprivation of one's livelihood is surely punitive. See Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 BUFF. CRIM. L. REV. 679 (1999).

79. *Rizek v. SEC*, 215 F.3d 157, 161 (1st Cir. 2000).

80. *FDIC v. Mallen*, 486 U.S. 230 (1988) (holding that a banking officer charged with a felony involving dishonesty may be suspended from his position summarily, and may not be entitled to a "prompt" postsuspension hearing).

81. *In re KPMG Peat Marwick LLP*, Exchange Act Release No. 43862, 74 SEC Docket 357 (Jan. 19, 2001) (holding that negligence, rather than scienter, will suffice to

IV. WHAT AN SEC ADMINISTRATIVE SUSPENSION AND BAR PROVISION OUGHT TO INCLUDE

While it certainly seems unnecessary to change the current statutory scheme, and perhaps unwise in view of the Commission's obvious desire to employ the suspension and bar sanction far more broadly than would be permitted in the federal courts, it is fair to consider just what an administrative suspension and bar provision might include. We can begin with analogies.

A number of federal statutes currently provide for "debarment" of one type or another.⁸² Some of these statutes, like the current Remedies Act provision, require a judicial determination that debarment is appropriate,⁸³ while others permit the determination to be made unilaterally by the federal agency involved. Some of the debarment provisions are categorical and therefore predictable, such as those that prohibit a person convicted of certain felonies from doing business with the federal government.⁸⁴ Other provisions require an exercise of discretion. Of the latter group, some provisions are quite detailed in setting out the issues to be considered prior to entering a

support a cease-and-desist order; that the showing required for a cease-and-desist order is "significantly less than that required for an injunction;" that only "some risk" of a future violation is necessary to support a cease-and-desist order; and that ordinarily the existence of a past violation will suffice to satisfy the "some risk" test); *In re KPMG Peat Marwick LLP*, Exchange Act Release No. 44050, 2001 WL 223378, at *6 (Mar. 8, 2001) (reiterating that the risk of future violations sufficient to support a cease-and-desist order is "significantly less than that required for an injunction"); *see also* Morrissey, *supra* note 21, at 467-70 (comparing the ease with which the SEC may pursue a cease-and-desist order, with the effort involved in seeking an injunction).

82. *See, e.g.*, 12 U.S.C. § 1818(e)(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]"); 21 U.S.C. § 335a(b) (2000) (permitting debarment of a person convicted of certain crimes where she has "demonstrated a pattern of conduct sufficient to find that there is reason to believe that [she] may violate requirements under this chapter relating to drug products").

83. *See, e.g.*, 15 U.S.C. § 80a-35 (2000) (authorizing district courts to suspend or bar an officer, director, or member of any advisory board of an investment company where the court finds that he has engaged in a practice constituting a breach of fiduciary duty involving personal misconduct); 29 U.S.C. § 1109 (1994) (authorizing district courts to remove a pension plan official where the court finds that he has breached any of the responsibilities, obligations, or duties imposed upon fiduciaries by [ERISA]).

84. *See, e.g.*, 5 U.S.C. § 8902a(b)(1) (2000) (foreclosing health care providers "convicted . . . of a criminal offense relating to fraud, corruption, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care service" from participation in the Medicare program); 21 U.S.C. § 335a(a) (foreclosing individuals convicted of an FDA-related felony from seeking approval for a generic drug product).

suspension or bar order,⁸⁵ while others are more amorphous.⁸⁶ Some of the bar provisions set a statutory limit on the number of years for which an offender can be taken out of circulation,⁸⁷ and others provide quite a detailed procedure for terminating the debarment or lifting the bar.⁸⁸

What all this means, simply, is that (1) Congress knew what it was doing when it assigned the decision-making role to the federal district courts rather than the Commission and required a finding of "substantial unfitness," and (2) Congress has a number of models to choose from should it choose to indulge the Commission's request for a change in the current statute.

Some of the statutes would make poor models for reform, though, insofar as they give virtually unbounded discretion to the agency empowered to enter a suspension and bar order unilaterally.⁸⁹ At least three statutes, however, would seem to provide useful models for drafting an SEC suspension and bar statute. The first is the statute governing debarment of investment company executives.⁹⁰ The second

85. See, e.g., 5 U.S.C. § 8902a(f) (requiring a decision on whether to bar a health care provider 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").

86. See, e.g., 15 U.S.C. § 80a-35 (permitting debarment of a person who has engaged or was about to engage in any act or practice constituting a breach of fiduciary duty involving personal misconduct, and such injunctive or other relief "as may be reasonable and appropriate in the circumstances, having due regard to the protection of investors and to the effectuation of the policies declared in section 80(a)-1(b) of this title").

87. See, e.g., 29 U.S.C. § 504 (1994) (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, 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 (establishing that the conviction for enumerated crimes bars the offender from serving as an administrator, fiduciary, officer, trustee, custodian, counsel, agent, employee, or representative of any employee benefit plan for at least three but no more than thirteen years); 33 U.S.C. § 569f (1994) (establishing that the conviction for intentionally affixing a label bearing a "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).

88. See, e.g., 5 U.S.C. § 8902a(g)(4) (permitting a barred health care provider to apply for reinstatement after the passage of three years, if he can provide "reasonable assurances that the types of action which formed the basis for the original debarment have not recurred and will not recur").

89. See, e.g., 12 U.S.C. § 1818(g)(1) (2000) (permitting federal bank regulatory agencies to remove summarily bank officials charged with certain crimes "if continued service or participation by such party may pose a threat to the interests of the depository institution's depositors or may threaten to impair public confidence in the depository institution").

90. 15 U.S.C. § 80a-9 (2000).

is the statute governing debarment of investment advisers.⁹¹ The third is the statute governing debarment of brokers and dealers.⁹² All three of these statutes contain specific and detailed language governing the circumstances under which a suspension or bar may be ordered by the SEC and accordingly require specific factual findings to be made.⁹³ The investment company provision also lays out a procedure by which a person subject to a bar order may seek an exemption if that order would be "unduly or disproportionately severe or [if] the conduct of such person has been such as not to make it against the public interest or protection of investors to grant such application."⁹⁴

Drawing on these examples, a reasonable provision for the SEC might look something like this:

- (a) The Commission may, after notice and opportunity for hearing, by order prohibit, conditionally or unconditionally, either permanently or for such period of time as it in its discretion shall

91. *Id.* § 80b-3.

92. *Id.* § 78α(b).

93. For example, in 15 U.S.C. § 80a-9(b), an investment company executive may be debarred 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 respect to any material fact, or has omitted to state in any such registration statement, application, or report any material fact which was required to be stated therein;

(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 [engaged in similar practices];

(5) [W]ithin ten years [he or she] 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) . . . ; or

(6) [B]y reason of any misconduct, [he or she] 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) . . . , 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.

Id. § 80a-9(b) (citations omitted).

94. *Id.* § 80a-9(c).

deem appropriate in the public interest, any person from serving or acting as an officer or director of any public company, if:

- (1) the Commission finds that, in the absence of such an order, the person is reasonably likely to continue to violate the federal securities laws and
 - (2) the Commission finds that such person is substantially unfit to serve in such a position, either permanently or temporarily.
- (b) The findings required in section (a) shall be made based on clear and convincing evidence.
- (c) The Commission shall, in considering such an order, determine that any such order is the least restrictive means of preventing harm to the public.
- (d) The Commission shall by regulation develop a process by which any such order may be terminated or modified on motion of the defendant after eight years, where the defendant can
- (1) demonstrate that the types of behavior that formed the basis for the original debarment or suspension have not recurred and
 - (2) provide reasonable assurances that such behavior will not recur.

This proposal is intentionally demanding, in part because the tendency of regulatory agencies generally to overprosecute⁹⁵ and in part because of the special risks that the suspension and bar sanction will be overutilized.⁹⁶ Thus, it specifically incorporates a “least restrictive means” provision, which will encourage the Commission to utilize shorter term suspensions rather than lifetime bars. It also specifically authorizes a process by which the bar may be lifted after a reasonable period of time. Without such a process, and a congressional signal that such a process is necessary, the Commission might well continue its practice of refusing to lift a bar even when the offender’s circumstances and behavior have materially changed.⁹⁷

95. See Clifton Leaf, *Enough Is Enough*, FORTUNE, Mar. 18, 2002, at 60, 68 (noting that in the ten years from 1992 to 2001, the SEC referred 609 cases to the Justice Department for possible criminal prosecution, over sixty-four percent of which the Justice Department declined to prosecute).

96. See Barnard, *supra* note 14, at 1520 (noting that “selective incapacitation schemes, such as that presented by the Remedies Act, inevitably result in courts sanctioning defendants for whom incapacitation is unnecessary (‘false positives’) far more often than they fail to sanction defendants for whom incapacitation is appropriate (‘false negatives’)”).

97. See SEC v. Coldicutt, 258 F.3d 939, 945 (9th Cir. 2001) (reflecting the Commission’s resistance to offender’s claim that after nine years of compliance with an injunction it should be vacated because “the stigma of the injunction cause[d] her

V. CONCLUSION

In enacting the Remedies Act, Congress obviously made a considered determination that, in the case of securities law offenders, a lifelong bar may be necessary in some cases to protect investors. It therefore authorized the comprehensive bar as a judicial option. Congress also, however, set the standard for entering such an order quite high when it required courts to make a finding of substantial unfitness. This decision took into account the many mechanisms by which corporate officers and directors are selected, monitored, incentivized, criticized, assessed by the press, evaluated by their peers, and challenged by the market. It also recognized that, even where securities laws offenders are *not* barred by court order from serving, they will seldom receive offers to serve as public company officers or directors. And in those few circumstances where an offender *is* invited to serve as an officer or director, (1) the details of her crimes will have to be disclosed to all parties, (2) institutional investors will be watching her closely, and (3) regulatory agencies like the SEC will have their eyes peeled and their knives sharpened in the event of future misconduct.

Congress, in short, believed that suspension and bar orders should be rare, that they should depend upon clear and convincing *factual* evidence of a likelihood of future harm to the public, and that the federal courts, rather than the SEC, were best suited to make the necessary findings of fact. Congress was right in these assumptions, and nothing in the twelve years since passage of the Remedies Act suggests otherwise.

Congress should now resist the efforts of the SEC to amend the Remedies Act. It should decline to grant the SEC the authority to bar and suspend offenders from serving as corporate officers and directors. Instead it should turn its energies to other kinds of reforms that will strengthen the SEC's hand where it matters.

embarrassment and distress, and that there [was] little likelihood she [would] again become active as a securities broker or be involved in the securities business").