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The Fourteenth Annual A.A. Sommer, Jr. Lecture on Corporate, Securities, and Financial Law at the Fordham Corporate Law Center

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Ben A. Indek Introductory Remarks[†]

Chair Mary Jo White Lecturer[‡]

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LECTURE

THE FOURTEENTH ANNUAL A.A. SOMMER, JR. LECTURE ON CORPORATE, SECURITIES & FINANCIAL LAW AT THE FORDHAM CORPORATE LAW CENTER[†]

THE IMPORTANCE OF INDEPENDENCE

WELCOME AND INTRODUCTORY REMARKS

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[†] The lecture was held at Fordham University School of Law on October 3, 2013.

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WELCOME AND INTRODUCTORY REMARKS

DEAN MARTIN: Good evening. I'm Mike Martin. I am the Dean of Fordham Law School. It's a privilege to welcome all of you this evening, both here in the McNally Amphitheater and in our overflow facilities through simulcast. This is the Fourteenth Annual A.A. Sommer Jr. Lecture and we are privileged this evening to have the current Chair of the Securities and Exchange Commission, Mary Jo White, here tonight to discuss "The Importance of Independence." In a few minutes, Ben Indek, partner at Morgan, Lewis & Bockius will introduce Chair White, but first I have the privilege of welcoming all of you to Fordham Law School.

The Sommer Lecture is co-sponsored by Morgan, Lewis & Bockius and the Fordham Corporate Law Center. It honors the legacy of Al Sommer, former SEC Commissioner and Securities Law practitioner. Mr. Sommer was a guiding light on the Commission, an outstanding lawyer, and a mentor to many scholars and practitioners of securities law. His work creating and supervising an advisory committee on corporate disclosure, which resulted in Regulation S-K, earned him a reputation as a leading advocate for transparency. At the 2007 Sommer Lecture, our speaker SEC Commissioner Paul Atkins remarked that this lecture has become a prominent forum in the ongoing dialogue among securities regulators, practitioners, and the securities regulated community.

Consistent with that reputation, Chair White will be addressing issues at the forefront of the current debates within the securities community. Just recently, *The Washington Post* spotlighted three officials who are ushering in a new era of greater accountability on Wall Street and we are proud to say each of them has spoken recently here at Fordham. First is the current U.S. Attorney for the Southern District of New York, Preet Bharara, who delivered the law school's graduation address last Spring. The second is the esteemed judge who not only gave the Eleventh DeStefano Lecture here, but is also in the audience tonight, the Honorable Jed Rakoff. And the third is our speaker tonight, the recently appointed SEC Chair, Mary Jo White, who, in her commitment to obtaining public accountability, embodies the ideals that we celebrate with the Sommer Lecture. It is truly an honor for the law school to have hosted these public officials and we are very pleased that Mary Jo White can be here with us tonight.

The annual Sommer Lecture is the Corporate Law Center's longest running tradition and we are grateful for the generous support of the Morgan, Lewis & Bockius firm. The Corporate Law Center brings scholars, professionals, policymakers, and students together for discussion and study of business and financial law. It was designed in 2001 as a think-tank to explore timely business and finance topics, and to showcase groundbreaking scholarship. The Center integrates trends and scholarly literature with real world events and topics that bridge the gap between academics and practitioners. Our programs and our business law faculty address complex questions that affect today's economic, political, and legal issues that impact the global financial markets. The Center also serves as a resource for our students, connecting them to our distinguished alumni through the Business Law Practitioners Series and various mentoring programs.

BEN A. INDEK: On behalf of Morgan Lewis, I welcome you to the Fourteenth Annual A.A. Sommer, Jr. Lecture. More than thirty years ago, Al Sommer started Morgan Lewis' securities law practice. And as a way to honor his role, we created this lecture series in his name. Al was a Morgan Lewis partner from 1979 until 1994 when he became counsel to our firm. He was an outstanding public servant. Al was an SEC Commissioner from 1973 to 1976. He also served as Chairman of the Public Oversight Board and as a public member of the AICPA. In private practice, Al was a trusted boardroom lawyer, a prolific author, and an expert commentator on a wide range of securities law topics. Al participated in the first two lectures we held at Fordham Law School. I vividly remember him taking the microphone and quizzing the lecturer on particular parts of his remarks. Sadly, he passed away in 2002. Nevertheless, we are delighted that his family continues its close relationship with Morgan Lewis and Fordham.

Indeed, over the years, several generations of the Sommer family have attended this event. We are delighted that they are here this evening. In 1973, Al was nominated by President Nixon to become an SEC Commissioner. In an interview with The SEC Historical Society decades later, Al joked that his diploma was signed by President Nixon and Henry Kissinger. That is a good segue into acknowledging and thanking the SEC Historical Society and its Executive Director, Carla Rosati, for their continued support of this lecture series.

Although they are separated by exactly four decades at the SEC and practiced in different areas, Al was the consummate boardroom lawyer, and Chair White is the extraordinary courtroom litigator. Al and Chair

White have several things in common. First, like Al, Chair White is also committed to public service. As you know from the program guide, Chair White has served an invariable alphabet soup of government positions. In the battle of the acronyms, it's Al's POB, AICPA, and SEC versus Chair White's SDNY, EDNY, and SEC. Sounds like a tie to me.

Second, in addition to public service, both Al and Chair White played leading roles at their law firms. Al with the assistance of many other lawyers, several of whom are here this evening began and then strengthened and expanded the Morgan Lewis securities and regulatory practice. Now, we have more than 100 lawyers in about a dozen cities around the world devoted to providing advice regarding securities law to financial institutions and public companies. Chair White led the litigation department at Debevoise & Plimpton and built that firm's practice into the powerhouse that it is today.

Finally, Al served the SEC at a critical time in the Commission's history and Chair White does so now. In the 1970's, Al was dealing with important issues like the aberration of fixed commissions, the then new national market system, and the delicate balance between regulation and competition during the financial crisis. Forty years later, Chair White and the SEC are confronting their own significant matters such as the increasing globalization of the markets, high speed trading, the introduction of new and complex products, and the creation and implementation of new rules and regulations as a result of Congressional mandates. In any event, I know that Al would have been interested to hear Chair White's lecture this evening. At Morgan Lewis, we are proud of Al Sommer's affiliation with the firm and delighted to sponsor this annual lecture in his honor. I am pleased to turn the podium over to our speaker tonight, Securities and Exchange Commission Chair, Mary Jo White.

LECTURE: THE IMPORTANCE OF INDEPENDENCE

CHAIR WHITE: Thank you. I am tremendously honored to have been asked to give the 14th annual A. A. Sommer, Jr. lecture. The topic I have chosen to speak about—"The Importance of Independence"—is in tribute to both Al Sommer and the many women and men who have served the SEC and investors since 1934.

A.A. SOMMER AND THE INDEPENDENCE OF THE SEC

As many of you know, Al Sommer, one of the finest securities lawyers in the nation, served as a Commissioner of the SEC from 1973 to 1976 and is a storied figure in the agency's history. He was appointed as Commissioner during the Watergate era when the SEC's own independence was challenged as it was facing accusations that it was too closely connected to the Nixon White House, including an allegation that a complaint in an enforcement action had been changed due to influence from the Administration.¹

When Commissioner Sommer, a Democrat, was sworn in a short time later, he joined a Commission that understood the need to quickly re-establish the reputation of the SEC as the most staunchly independent agency in the federal government and make it clear that politics had no place in its hallways. And he along with Chairman Ray Garrett, Jr., a Republican, led the effort to do just that.

In their spare time, they spearheaded the Commission's groundbreaking rules to "unfix" brokerage commissions and establish a national securities market system.

In 1996, when he was given the William O. Douglas award, the SEC's highest honor, former Commissioner Sommer captured the essence of the SEC this way:

The staff of the Commission has never lacked for courage. They have gone to the mat with investment bankers, exchanges, the public utility industry, the accounting profession, the legal profession and, for that matter, on occasions with the entire world of American industry. In every case there were loud howls, efforts to bring political pressure to bear; unfailingly the Commission stuck to its guns and fought to implement the policies it thought were right. It may rightly be said that the SEC has done more to raise the moral level of the marketplace than any other institution, public or private, in the United States.²

That is the wonderful legacy of the SEC and its staff.

I have always had a very strong affinity for the SEC—because of its incredibly important mission and its talented and dedicated staff. But, it is also the independence of the SEC that was one of the main reasons I

1. See *The Bright Image: The SEC, 1961-1973*, SECURITIES AND EXCHANGE COMMISSION HISTORICAL SOCIETY, www.sechistorical.org/museum/galleries/tbi/crisis_b.php (last visited Oct. 13, 2014).

2. A.A. Sommer, Jr., Remarks at the Annual Meeting of the Association of SEC Alumni (Mar. 8, 1996).

agreed to accept the opportunity offered to me by the President to serve as its Chairman.

When I served as the United States Attorney for the Southern District of New York from 1993 to 2002, I headed an office that was referred to as the “Sovereign District”—and that was not meant as a term of endearment. But the Southern District U.S. Attorney’s Office is an office older than the Department of Justice, and sovereignty, as well as its nickname, have served it very well. As I used to say as U.S. Attorney, your conscience is your client and your only mandate is to do the right thing in the public’s best interest.

The SEC does not need a nickname to establish its independence. Under the law, the SEC is an independent agency, consisting of five Commissioners, no more than three of whom can be from the same political party.³ As with other independent agencies, the President cannot remove a Commissioner without cause and the agency does not report or answer to the White House or any part of the administration. This independence and the quality of its people allow the agency the freedom to do what it believes is right for investors and our markets, without the interference of politics or outside pressures

MAINTAINING OUR INDEPENDENCE

Being independent, of course, does not mean that the SEC does not listen to the ideas and recommendations that come from beyond our building. It also does not mean that we should not welcome the views of investor advocates, companies, Members of Congress, or financial institutions.

Indeed, we depend upon hearing and evaluating the ideas and recommendations of those who will be impacted by our rules, including those required to comply with them. In fact, the laws that govern our “notice and comment” rulemaking process direct us to seek out these views and, more importantly, *consider* them.⁴ And, if we do not do so, the courts could potentially strike down the rule and send us back to the drawing board.

More importantly, seeking out and considering public comment by all interested and affected parties makes for much better decisions and much better rules.

3. SEC v. Blinder, Robinson & Co., 855 F.2d 677, 681 (10th Cir. 1988).

4. See Administrative Procedure Act of 1946, 5 U.S.C. § 553 (2006).

At the end of the day, however, we make our decisions based on an impartial assessment of the law and the facts and what we believe will further our mission—and never in response to political pressure, lobbying, or even public clamor. All comments and recommendations, from whatever the source, are judged on their merits—and their validity has no greater weight just because more influential or better connected commenters say so, or say so more loudly.

The professionals at the SEC, like those in a prosecutor’s office, know that they are better able to perform that impartial assessment when they honor the mission of the agency, respect its independence, and check their party affiliations at the door.

A few years ago, at the request of Senator Charles Schumer, I testified before the Senate Judiciary Committee investigating the firing of a number of sitting U.S. Attorneys.⁵ The circumstances of those firings suggested they were not based on the merits, but rather on purported failures to be sufficiently responsive to Justice Department policies or to politicians seeking to influence decisions.⁶ United States Attorneys, like SEC Commissioners, are appointed by the President and confirmed by the Senate.

My testimony, which like tonight was about the importance of independence,⁷ echoed the views of those fired United States Attorneys whose joint written testimony made the point very well. They said:

Every United States Attorney knows that he or she is a political appointee, but also recognizes the importance of supporting and defending the Constitution in a fair and impartial manner that is devoid of politics. . . . The prosecution of individual cases must be based on justice, fairness, and compassion—not political ideology or partisan politics.⁸

In my view, SEC Commissioners are no different.

A couple of months ago, there was a very interesting article in the *New York Times* by Floyd Norris, entitled “Independent Agencies,

5. *See Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?:* Hearing Before the S. Comm. on the Judiciary, 110th Cong. 45-47, 99-106 (2007) (statement of Mary Jo White, former U.S. Attorney for the Southern District of New York).

6. *See id.* at 46.

7. *See id.* at 45-47, 99-106.

8. Restoring Checks and Balances in the Confirmation Process of U.S. Attorneys: Hearing on H.R. 580 Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary, 110th Cong. 48 (2007) (testimony of terminated United States Attorneys).

Sometimes in Name Only.”⁹ It caught my eye initially because it included a rather large, “only-a-mother-could-love” photo of me over a caption that read: “The power of agency leaders, like Mary Jo White, Chairwoman of the SEC, has been reduced.”¹⁰ Naturally, I read on with particular interest.

Indeed, I read the piece a couple of times to be sure I understood its precise meaning. Several points were made, including that independent agencies like the SEC had become less independent and less powerful. This was because some fifteen years ago, the President had effectively ceded the appointment power over all SEC Commissioners, other than the Chairman, to majority and minority senior Senators.

Another observation was that the Chairman was now expected to hew to the party line of the appointing President, or risk nudges to resign as was said to have happened when a recent Republican Chairman voted too often with the Democratic members of the Commission.

At the risk of being labeled naïve, I would like to think that these conclusions are not entirely correct or at least not inevitably so. U.S. Attorneys have long been effectively selected by their home state Senators and yet their tradition of fierce independence that I have just talked about prevails once they take office.

And, I remember when Democratic Senator Daniel Patrick Moynihan announced to the press in 1993 that he was recommending me and two other New Yorkers as United States Attorneys to President Clinton. At the time he was asked whether all three of us were Democrats. He responded, “I have no idea.” And, he didn’t. As it turns out, two of the three of us were Democrats, and I was, as I am today, an Independent.

Al Sommer himself, in his 1996 remarks, spoke about a similar political blindness at the SEC. He said: “[H]ad anyone sat through every meeting while I was on the Commission, that person could never have told which of the Commissioners were Republicans and which were Democrats.”¹¹

And that is how it should be. In my view, political appointees, whether they be United States Attorneys or SEC Commissioners, and no matter who has chosen them, become upon appointment, independent

9. Floyd Norris, *Independent Agencies, Sometimes in Name Only*, N.Y. TIMES, Aug. 9, 2013, at B1.

10. *Id.*

11. Sommer, Jr., *supra* note 2.

actors, duty-bound to uphold the Constitution, the laws of the United States and the mission of the their agency. Politics are to be left at the door. That is our sworn duty.

This does not mean that one's experience, perspectives and points of view should not be drawn upon in assessing policy issues—but experience, perspective and point of view are not the same thing as politics.

And, all of us at the SEC must fully appreciate this distinction if we are to be true to our tri-partite mission to protect investors, facilitate capital formation, and ensure fair and orderly markets.

Now, even I realize that there are limits on Washington's ability to be politically independent. Commissioner Sommer understood this too. Although endorsed by Republican Chairman Garrett to succeed him as the next Chairman, Commissioner Sommer, as a Democrat, ultimately was “passed over” by a Republican President.¹²

I imagine Commissioner Sommer may well have shrugged and thought, as I would have, that perhaps that degree of independence was a step too far for Washington to bear, even for the head of an independent agency. Though, I do note that both I and former Chairman Mary Schapiro are independents. So maybe there is hope.

A TRACK RECORD OF INDEPENDENCE

Proudly, I can say that this talk about the importance of independence is not rhetoric. There are many examples in the history of the SEC, where the agency stood its ground and stood tall as the independent body that it is.

2009

In 2009, when Mary Schapiro became Chairman, she found herself heading an agency that some wanted to diminish in one way or another.

At one point, during the early drafting of what would become the Dodd-Frank Act, there was serious consideration within the administration of eliminating the SEC's authority to protect investors of mutual funds. The plan under consideration was to ship off the mutual fund products to a new agency—one that would not have the in-depth

12. See *In the Midst of Revolution: The SEC, 1973-1981*, SECURITIES AND EXCHANGE COMMISSION HISTORICAL SOCIETY, www.sechistorical.org/museum/galleries/rev/rev02a.php (last visited Oct. 13, 2014).

knowledge of the workings of the securities markets in which mutual funds operate.

Concerned about undoing the entire blanket of expertise and investor protections that the SEC had developed and safeguarded for over 75 years, Chairman Schapiro took a stand. Questioning “pretty profoundly any model that would try to move investor protection functions out of the [SEC],” Chairman Schapiro said publicly that such a move could not be done “without really damaging the fabric of the entire investor protection regime.”¹³

It was described in the media as a “sharp public breach with the administration,”¹⁴ coming from a Chairman who believed that “the SEC must play a key role as an independent watchdog protecting investors in any new financial regulation system.”¹⁵

That was independence exercised in defense of a strong SEC and to protect investors.

2000

About a decade before that, Chairman Arthur Levitt similarly faced pressure—this time from Congress and the industry—when he called for a rule to make accounting firms more independent from the companies they audit.

The rule came about because Chairman Levitt was disturbed by, among other things, the number of cases of financial fraud that the SEC was seeing. He was concerned that the major accounting firms were not only providing audit services for major clients, but also offering consulting services. And, that, he thought, led to a conflict of interest for accountants who would worry about upsetting their clients if their audits were not clean.

As he tells it, Congress kept the heat on him with calls, letters, Congressional hearings, and ultimately by threatening the funding of the

13. Martin Crutsinger and Marcy Gordon, *SEC Head Objects to Obama Financial Watchdog Plan*, ASSOCIATED PRESS, May 20, 2009.

14. *Id.*

15. *Id.*

agency itself.¹⁶ But, he pressed ahead nonetheless and the SEC eventually passed a conflict of interest rule.¹⁷

That was independence exercised in support of a stronger financial reporting system that could better inform and protect investors.

1990

In 1990, Chairman Richard Breeden was rightly hailed for his independence from the Treasury Department's free market economists when he strongly supported legislation to require more disclosure by broker-dealers about risky financial transactions. He also championed a provision in the legislation to give the SEC authority to restrict abusive trading practices during periods of market turmoil.¹⁸

That was independence exercised in support of an even stronger SEC in order to foster stronger and fairer capital markets.

1984

Going back a few years before that, the SEC led by Republican Chairman John Shad pursued an insider trading case against a director of a company that had been engaged in merger talks. The allegation was that the director had passed inside information to his friends.

The agency was not deterred by the fact that the director happened to be, at the time, the current Deputy Secretary of Defense appointed by President Reagan.¹⁹

That was independence exercised without fear or favor.

Years later, Chairman Harvey Pitt would declare in another case that: "No one in this country gets a pass...No one gets special treatment."²⁰

16. See *Frontline: Bigger than Enron: Congress and the Accounting Wars* (PBS television broadcast June 20, 2002), <http://www.pbs.org/wgbh/pages/frontline/shows/regulation/congress/index.html#3>.

17. See 17 C.F.R. §§ 210, 240 (2001).

18. See David Vise, *Crisis Management Dominates SEC Chairman's Agenda: Securities: Richard C. Breeden has had to deal with a 190-point plunge of the Dow Jones industrials and an earthquake*, WASH. POST, Jan. 8, 1990.

19. See Leslie Maitland Werner, *Ex-Defense Deputy Enters A Guilty Plea In Stock Trade Case*, N.Y. TIMES, Mar. 5, 1985, <http://www.nytimes.com/1985/03/05/business/ex-defense-deputy-enters-a-guilty-plea-in-stock-trade-case.html>.

20. *SEC Chief Vows Tough Halliburton Probe*, CHI. TRIB., July 15, 2002, available at http://articles.chicagotribune.com/2002-07-15/news/0207150167_1_sec-scrutiny-overruns-on-construction-jobs-halliburton.

That is the SEC at its best and as embodied by Commissioner Al Sommer.

My final example is about him. In an interview he gave to the SEC Historical Society in 2001, Commissioner Sommer recounted two meetings industry representatives had with him and Chairman Garrett during a period of significant recession in which the Commission was asked to “help” the industry. Although their “ask” was “sort of obscure” he said, they seemed to be requesting that the SEC’s enforcement division be asked to “let up” on the industry and do their job more like the friendlier banking regulators did.²¹ Al Sommer’s response, both times, was that the best thing we can do to help the industry is to ensure “the maintenance of fair and orderly markets.”²² Full stop. And spot on.

RESPECT FOR OUR INDEPENDENCE FROM THOSE OUTSIDE

These are just a few of many examples of independence in action at the SEC over the years.

But, the independence of the agency should not only be defended by those within. It also should be respected by those outside, including the industry, other agencies, Congress and the courts. That independence—and the agency’s unique expertise—should be, for example, respected by those who seek to effectuate social policy or political change through the SEC’s powers of mandatory disclosure.

Disclosure is indeed a key ingredient in the securities arena. It gives investors the information they need about their investments. It provides them with information about the operations, management and financial condition of the companies they invest in. And, it allows informed investors to participate in a free and fair market.

My former colleague Commissioner Troy Paredes, who delivered the Sommer lecture in 2011, put it this way: “[T]he foundational cornerstone of the [SEC’s] regulatory regime has remained fixed: It is disclosure. For over 75 years, the SEC’s signature mandate has been to use disclosure to promote transparency.”²³

21. Interview by Richard M. Phillips with A.A. Sommer, Jr., S.E.C. Historical Society, at 9-10 (Oct. 1, 2001), *available at* <http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/oral-histories/sommer110101Transcript.pdf>.

22. *Id.* at 10.

23. Troy Paredes, Comm’r, SEC, Keynote Address at the Twelfth Annual A.A. Sommer, Jr. Lecture on Corporate, Securities and Financial Law (Oct. 27, 2011), *in*

He made the additional unassailable points that there are also costs associated with mandatory disclosure and “too much disclosure can be counterproductive.”²⁴ Commissioner Sommer also frequently expressed concern about the increasing “quantity and complexity” of disclosure.²⁵

Their concerns resonate with me. When disclosure gets to be too much or strays from its core purposes, it can lead to “information overload”—a phenomenon in which ever-increasing amounts of disclosure make it difficult for investors to focus on the information that is material and most relevant to their decision-making as investors in our financial markets.

To safeguard the benefits of this “signature mandate,” the SEC needs to maintain the ability to exercise its own independent judgment and expertise when deciding whether and how best to impose new disclosure requirements.

For, it is the SEC that is best able to shape disclosure rules consistent with the federal securities laws and its core mission. But from time to time, the SEC is directed by Congress or asked by interest groups to issue rules requiring disclosure that does not fit within our core mission.

Such a situation arose back in the 1970s, after Congress passed a statute requiring all federal agencies to consider environmental values as part of their regulatory missions. The SEC sought to implement this mandate by crafting a rule requiring certain environmental disclosures. The procedural details are not necessary to trace. Suffice it to say that this was a complicated, multi-year process that involved a rulemaking petition seeking additional environmental disclosures and disclosures about companies’ equal employment practices; court challenges; and a re-do of the rule.²⁶

<http://www.sec.gov/news/speech/2011/spch102711tap.htm>.

24. *Id.*

25. A.A. Sommer, Jr., Comm’r, SEC, *Differential Disclosure: To Each His Own*, Address at the Second Emanuel Saxe Distinguished Accounting Lecture (Mar. 19, 1974) at 18, *in* <http://www.sec.gov/news/speech/1974/031974sommer.pdf>.

26. *See, e.g.*, Notice of Commission Conclusions and Final Action on the Rulemaking Proposals Announced in Securities Act Release No. 5627 (Oct. 14, 1975), Release No. 33-5704, 9 SEC Docket 540 (May 6, 1976); Notice of Commission Conclusions and Rulemaking Proposals in the Public Proceeding Announced in Securities Act Release No. 5569 (Feb. 11, 1975), Release No. 33-5627, 8 S.E.C. Docket 73 (Oct. 14, 1975); *Natural Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031 (D.C. Cir. 1979).

As part of the process, the Commission requested public comment about whether further disclosure of environmental matters was necessary to comply with the statutory mandate. It also sought comment on whether disclosure should be required about other areas, including those related to the social policy matters that had been raised by the petition.

Public hearings were held and the Commission received requests from investors for disclosure of more than 100 different “social matters”—matters that the Commission called a “bewildering array of special causes.”²⁷ The topics included advertising practices, charitable contributions, political contributions, community activities, the nature of operations in South Africa, U.S.–Soviet trade, health hazards in plants, and “good things a company has done.”²⁸

Ultimately, the Commission declined to require disclosure on any of the social issues, noting that there was no distinguishing feature that would justify treating the equal employment practices petition—which it had rejected—any differently than the other 100 social matters.

The Commission also said that disclosure of such non-material information regarding each of the identified matters would render disclosure documents wholly unmanageable and increase costs without corresponding benefits to investors generally.²⁹

And it noted that “[a]s a practical matter, it is impossible to provide every item of information that might be of interest to some investor in making investment and voting decisions.”³⁰

Interestingly, in its landmark 1977 report, the SEC’s Advisory Committee on Disclosure, chaired by Al Sommer, responded to these issues. It recommended that “the Commission require disclosure of social and environmental information only when the information . . . is material.”³¹ It then went on to endorse the Commission’s conclusions

27. Notice of Commission Conclusions and Rulemaking Proposals in the Public Proceeding Announced in Securities Act Release No. 5569 (Feb. 11, 1975), Release No. 33-5627, 8 S.E.C. Docket 73 at 20 (Oct. 14, 1975).

28. *See id.* at 20 n.72.

29. *See id.* at 20.

30. *Id.* at 7.

31. *Report of the Advisory Committee on Corporate Disclosure to the Securities and Exchange Commission for the H. Comm. on Interstate and Foreign Commerce*, 95th Cong. D-21 (Nov. 3, 1977), available at http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1970/1977_1103_AdvisoryDisclosure.pdf.

regarding these issues saying that “there are no broad categories of [such] information not now covered by mandatory disclosure requirements that should be made the subject of new requirements.”³²

RECENT CALLS FOR DISCLOSURE

While the environmental statute at issue then generated a lengthy rulemaking process, it provided the agency with a good deal of flexibility. But, some more recent disclosure directives from Congress have been quite prescriptive, essentially leaving no room for the SEC to exercise its independent expertise and judgment in deciding whether or not to make the specified mandated disclosures.

The Dodd-Frank Wall Street Reform and Consumer Protection Act provides examples. The Dodd-Frank Act is, of course, a landmark piece of legislation that is designed to address the causes of the financial crisis and reduce the likelihood it will happen again. And most of the more than 90 rulemakings and studies required of the SEC relate to that overarching purpose and our core mission.

The Dodd-Frank Act, for example, authorizes us to establish a robust regulatory regime for derivatives, which just years earlier Congress forbid us from regulating. And, it directs us to write rules requiring private fund managers and municipal advisors to register with the SEC. These are measures directly aimed at making our financial system and the protections for investors stronger.

But other mandates, which invoke the Commission’s mandatory disclosure powers, seem more directed at exerting societal pressure on companies to change behavior, rather than to disclose financial information that primarily informs investment decisions.

That is not to say that the goals of such mandates are not laudable. Indeed, most are. Seeking to improve safety in mines for workers or to end horrible human rights atrocities in the Democratic Republic of the Congo are compelling objectives, which, as a citizen, I wholeheartedly share.

But, as the Chair of the SEC, I must question, as a policy matter, using the federal securities laws and the SEC’s powers of mandatory disclosure to accomplish these goals.

That said, as a lawyer and a former prosecutor, I recognize that when Congress and the President enact a statute mandating such a rule, neither I nor the Commission has the right to just say “no.” We cannot

32. *Id.*

say that a law does not comport with our mission as we see it, and ignore a Congressional mandate. We cannot put it in a drawer or tuck it away. That would be impermissible nullification of the law and independence run amok.

Instead, in such cases, we can, unless no leeway is given, write the rule in a way that best comports with our view of our mission and tries to mitigate the costs, so long as we faithfully carry out Congress' mandate.

To be sure, we can and should proactively urge that, as an independent and expert agency, we be accorded the freedom and respect by Congress to fully exercise our disclosure authority to further the mission that is so vital to the capital markets and investors.

JUDICIAL INVOLVEMENT

I should not conclude this talk about the importance of independence without mentioning our third branch of government—the judiciary.

When I urge the courts to defer to the SEC's independence and expertise, I am really only making the point that separation of powers requires each of us to respect and stay in our respective lanes.

There is a fair amount of law on this. As stated in cases like *Chevron*,³³ the courts must defer to an agency's interpretation of a law if the statute is silent or ambiguous on a particular point. And in reviewing agency rulemaking, the courts should defer to the agency's reasoned judgments, particularly as to matters within the agency's expertise. We, of course, may not always agree with the courts on where the yellow lines are, but it is something we confront because these issues come up more frequently than I would like in our rulemaking.

They also occasionally come up in the review of our enforcement settlements. While I will not speak of any specific cases, or ill of any of my judicial friends, I will say a word about our new protocol requiring, in certain cases, admissions from defendants if a settlement is to be reached.

This is an issue that I have considered since my days as U.S. Attorney, when I was the first prosecutor to pursue a deferred prosecution agreement with a corporation. At the time, there was no template or guidance, but I did decide, in the exercise of my charging

33. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

discretion, to require admissions in the particular circumstance of that case.

When I came to the SEC, I made a similar judgment. I decided that in some cases involving particularly egregious conduct or widespread harm to investors, for example, that a heightened level of public accountability, in the form of admissions, may be called for if we are to send a sufficiently strong message of deterrence.

I realize that many other federal agencies and regulators continue to pursue a uniform no-admit approach. And, I defer to their independent judgment. Indeed, as I have said, the SEC's longstanding, no-admit-no-deny paradigm continues to be of enormous value because it provides swift remedies for misconduct and quick relief to investors without the risk of litigation. We, too, will continue to use this powerful tool.

These are discretionary enforcement and charging judgments. And, the SEC needs to use its independent discretion—its experience and its know-how—to decide whether an added degree of accountability should lead us to decide to require them in certain cases. It is our responsibility to make these decisions in the public's best interest. And we will.

We recognize that, under the law, a court can review a settlement. But a court that reviews a settlement that a law enforcement agency like ours enters with a defendant has a more limited task. It is unlike a court's wide-ranging inquiry into the merits of a class-action settlement, for example. A court reviewing a consent judgment in one of our cases has a narrower focus—making sure that the settlement is not ambiguous and that it does not affirmatively harm third parties or impose an undue burden on the court's own resources.³⁴ But, the core decision as to whether to seek admissions is a decision for the Commission to make in its best, independent judgment of what should be required.

CONCLUSION

At the SEC, the staff and Commission have a long and proud history of standing up to outside pressures of all kinds that have challenged our independence. The Chairs who have come before me have held firmly to this independence, and so have the thousands of members of the SEC staff who worked with them. To my mind, the SEC achieves the best results and best fulfills its mission, when it uses its expertise, acts independently, and defends that independence against all

34. See *United States v. Microsoft Corp.*, 56 F.3d 1448, 1462 (D.C. Cir. 1995).

comers. It is a simple principle. And, as long as I am Chair, I will be guided by it.