

From: Harvey Pitt  
Sent: Thursday, June 23, 2005 10:40 PM  
To: 'donaldsonw@sec.gov'; 'Glassman, Cynthia'; 'goldschmidh@sec.gov'; 'Campos, Roel'; 'Atkins, Paul'  
Subject: Revisitation of the Commission's Mutual Fund Rules

Dear Chairman Donaldson and Commissioners Glassman, Goldschmid, Campos and Atkins:

On Tuesday, the District of Columbia Circuit Court embraced the SEC's authority to impose a controversial rule requiring that mutual fund board chairs be independent. But, to use the Commission's own current jargon, the Court criticized and rejected the agency's transparency, governance and thoroughness in considering the costs its proposed rule might impose, and any less invasive alternatives that were available. Confronted with that stark reminder of the importance of adhering to the rule of law, and following appropriate processes, I assumed the Commission would take a fair amount of time to consider the Court's opinion, and develop a record on which to reconsider its prior actions.

That, however, doesn't appear to be what's about to happen. With the Chairman retiring the very next day, and two supporting Commissioners whose terms have both expired already, the Commission has announced its plan to use next week's final open meeting of Chairman Donaldson's tenure to readopt the exact same rule, again presumably by a three-to-two vote, with only the three commissioners whose terms are ending embracing either the process or the result. That has never before been the course followed by an independent regulatory agency, and certainly never before has it been the methodology at the SEC.

When the Commission's rule was up for consideration, I along with the six other living former SEC Chairmen, supported the rule, despite my concern that the rule was more cosmetic than substantive. After all, abuses in the fund industry cried out for action and, in the absence of the fund industry taking the lead itself, the government was virtually forced to weigh in.

But, as a society, we long ago rejected Machiavelli's notion that any end thought to be worth pursuing can justify any means of getting to that result, even means that are legally suspect and immoral. If the Commission proceeds with its reconsideration of these rules, the Commission is proposing to do precisely that.

The rules in question took a considerable period of time to gestate through the system. The decision of the Court of Appeals is not even two days old, yet. What's the rush? It surely can't be substantive. It also surely can't reflect a desire to implement the teachings of the Court's decision promptly. No, the only plausible explanation for what the Commission is proposing to do must be that the three whose terms have ended or are ending don't want to leave the issue in the hands of Chairman Donaldson's successor and their two remaining colleagues. That makes a mockery of the rule of law. Worse, it breeds and encourages disrespect for the agency's actions - not just this action, but all of them. How could any court decide that other rules enacted by the same three-to-two votes (or even controversial rules adopted by five-to-zero votes) weren't also the product of suspect motivations?

The SEC is far too important, and far too vital to allow suspect motivations to take over in the waning days of Chairman Donaldson's tenure. If the SEC were evaluating this behavior by the Chairman and two directors of a publicly-held corporation intent on trampling the rule of law and the rights of the minority as lame ducks and expiring terms, – its Enforcement Staff would be all over the perpetrators of such conduct, as it should be, and the agency would be expressing appropriate pieties about transparency, governance, and protecting the rights of public investors.

The agency tasked with promoting the public interest can't act this way if it expects others to take it seriously. If the SEC can't be trusted to practice what it preaches, can anyone really have much faith in or respect for what it's preaching to others? Rather than demeaning the agency's credibility and impugning its morality, the SEC should immediately remove this issue from its last public meeting before Chairman Donaldson's resignation becomes effective, and stick to important, but properly-motivated, objectives.

Sincerely,

Harvey L. Pitt