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ARTICLES

THE CUA SECURITIES ISSUES FORUM: A PREFACE

By
*David A. Lipton**

In the Fall of 1992, the School of Law of Catholic University of America and its Securities Alumni Practice Group held the first in what is planned to be a series of occasional Securities Issues Forums.

The forum series is intended to stimulate fresh analyses of securities laws and to provide an ongoing critique of the functioning of the national securities regulation system. The first speaker in this series was former Securities and Exchange Commissioner Edward Fleischman. Fleischman's talk, entitled "Toward Neutral Principles: The SEC's Discharge of its Tri-Functional Administrative Responsibilities," was presented on September 22, 1992. A transcription of that address follows below. In his address, Fleischman identified and described the difficulties that he perceives to result from combining, within a single administrative agency (the SEC), rulemaking, prosecutorial, and adjudicatory functions. Two former SEC Directors of the Division of Enforcement—the Honorable Stanley Sporkin and John M. Fedders—responded to Fleischman's comments. Fedders' written critique of the former Commissioner's talk follows the transcription of Fleischman's speech.

It is altogether fitting that the Forum series should be initiated by an address that essentially challenges one of the most basic premises of the securities regulatory system—the viability of coordinating several industry oversight functions within a single administrative agency. As attorneys and academics, we remain alert to the possibility that even those institutions which we have come to accept as essential to the fabric of our regulatory system can, over time, lose their vitality if not viability. This diminished effectiveness may be a response to both internal institutional metamorphoses, as well as external alterations in the requirements and values of society and of the financial institutions supervised by the Commission.

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As Fleischman acknowledges, the basic tenets of government oversight of industry by means of a single administrative agency have, over the decades, been examined and re-examined within the contexts of governmental and private studies as well as judicial decisions. In these instances, positive conclusions generally have been reached regarding the operational viability of this administrative approach. However, Fleischman raises a slightly different variety of challenge, which perhaps may be described as a psychological analysis of the institution which is the Securities and Exchange Commission. In this analysis, Fleischman suggests that the Commission has assumed a "self-generative and self-vindicative character." This institutional character, arising out of an historical and perhaps understandable institutional drive for consistency, compels the Commission to ratify policies adopted within one component of its authority by positions assumed within another component of its authority. This practice becomes a concern to Fleischman when the drive for consistency "infects" the Commission's quasi-judicial role as an appellate tribunal that reviews decisions of administrative law judges.

While disagreement will be raised with the former Commissioner and observations will be introduced to contradict the conclusions which he has reached, the questions which Fleischman has raised, one way or another, may not be ignored. It must be borne in mind that Fleischman has developed his psychological evaluation of the SEC from a unique vantage point—one which is shared by a "de minimus" number of practicing attorneys. Fleischman's doubts and concerns arose while he was an insider at the highest level of the SEC, who indeed spent six years observing the Commission's procedures and interacting both with the institutional and human personalities that make up the Commission. On the sole basis of this experience, Fleischman's evaluations may not be lightly dismissed.

Another SEC veteran and highly regarded securities lawyer, former Director of Enforcement John M. Fedders, disagrees with Fleischman's conclusions. In responding below to Fleischman's arguments, however, Fedders does not take exception to one of the central arguments upon which the former Commissioner based his position—i.e., that the Commission is, to some degree, out of step with the needs of the industry and profession which it supervises. Granted, Fedders does not link the Commission's operational deficiencies to its tri-functional administrative responsibilities. Instead, Fedders suggests that the Commission's supervisory activities have not kept pace with developments in the securities industry and legal profession. In fact, Fedders calls for augmented Commission activism. For example, Fedders notes the gap that has developed in the response of federal court opinions to the conduct of industry personnel as a result of the dramatic increase in the use of arbitration for resolution of investor/broker disputes. To rem-

edy this deficiency in guidance for the industry, Fedders suggests that the Commission fill the void with “administrative opinions, releases or commissioners’ speeches and writings.” Further, Fedders advises the Commission to decrease the use of settlements as a protectionist device against open debate of its ideas and to instead invite greater judicial scrutiny of its views by permitting cases to be litigated to their conclusions.

It is interesting to note that these two significant players, who each have held influential positions at the SEC within the past decade, both find the Commission deficient in its administrative responsibilities. The reader need not agree with the conclusions reached by either of these gentlemen. What is important is that debate be continued on the efficacy of the administrative service performed by the SEC and other regulatory agencies. An admirable agency record should not preclude an examination into the needs and means of administrative improvement.

