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The Insider Trading Sanctions Act of 1984: Does the ITSA Authorize the SEC to Issue Administrative Bars?

THE INSIDER TRADING SANCTIONS ACT OF 1984: DOES THE ITSA AUTHORIZE THE SEC TO ISSUE ADMINISTRATIVE BARS?

The Insider Trading Sanctions Act (ITSA)[1] includes amendments to the Securities Exchange Act of 1934 ('34 Act)[2] which expand the range and severity of remedies available to the Securities and Exchange Commission (SEC) to counter insider trading.[3] Among the least publicized of the amend-

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1. *See* Pub. L. No. 98-376, 98 Stat. 1264 (1984), *reprinted in* 2 FED. SEC. L. REP. (CCH), 20,152R, 20,357, 20,366, 20,474, 20,484, 20,284A, 20,601 (1984) [hereinafter cited as ITSA]. The Insider Trading Sanctions Act of 1984 (ITSA) increases the sanctions against trading in securities while the trader possesses material nonpublic information. *See* H.R. REP. No. 355, 98th Cong., 1st Sess. 1, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 2274 (report of House version of ITSA, H.R. 559) [hereinafter cited as HOUSE REPORT]. The House originally passed a version of the ITSA, H.R. 559, on September 19, 1983. *See* 129 CONG. REC. H7013 (daily ed. Sept. 19, 1983). After amending the bill, the Senate passed the Senate version of H.R. 559, S.910, on June 29, 1984. *See* 130 CONG. REC. S8914 (daily ed. June 29, 1984). The House subsequently amended H.R. 559 by adopting the changes in S.910 and thereby prevented the need for a conference committee-sponsored bill. *See* 130 CONG. REC. H7760 (daily ed. July 25, 1984). President Reagan signed the bill into law on August 10, 1984. *See* 16 SEC. REG. & L. REP. (BNA) No. 33, 1383 (Aug. 17, 1984).

2. Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk (1982) [hereinafter cited as '34 Act].

3. *See* Lynch, *The Insider Trading Sanctions Act: New Remedies for the SEC,* 31 FED. B. NEWS & J. 166, 166 (April 1984) (ITSA authorizes SEC to seek both new and more severe remedies for insider trading than available under '34 Act); HOUSE REPORT, *supra* note 1, at 2281 (ITSA increases deterrent to insider trading and gives SEC added flexibility in dealing with inside traders); 130 CONG. REC. H7760 (daily ed. July 25, 1984) (statement of Rep. Wirth, Chmn., House Subcommittee on Telecommunications, Consumer Protection, and Finance) (ITSA should aid enforcement of securities laws by increasing penalty for insider trading); 130 CONG. REC. S8912 (daily ed. June 29, 1984) (statement of Sen. D'Amato, Chmn., Senate Subcommittee on Securities) (ITSA should combat increasing incidence of insider trading by significantly increasing penalty against inside traders). Not all comment on the ITSA, however, has been positive. *See* Note, *A Critique of the Insider Trading Sanctions Act of 1984,* 71 VA. L. REV. 455, 486-91 (1985) (ITSA may not achieve expected level of deterrence to insider trading); *see also* Brodsky, *The Insider Trading Sanctions Act of 1984: New Wine Into New Bottles?,* 41 WASH. & LEE L. REV. 921, 922 (1984) (in addition to adding layer of sanctions, ITSA may change substantive law of insider trading). If the ITSA actually changes the substantive law of insider trading, such a change contravenes the express intention of the bill's drafters. *See* 130 CONG. REC. H7760 (daily ed. July 25, 1984) (statement of Rep. Wirth) (ITSA not intended to change substantive law). The ITSA may change the substantive law of insider trading in three ways. Brodsky, *supra,* at 938-940. The ITSA effectively may overturn established case law by making liable any individual who trades while possessing information that the individual acquired and used in breach of the individual's obligations to others, regardless of the individual's duty to or relationship with the issuer of the traded shares. *Id.* at 938. *But see* Chiarella v. United States, 445 U.S. 222, 231-35 (1980) (mere possession of nonpublic market information absent duty or relationship to issuer does not make trading on that information illegal). The ITSA also may eliminate the traditional causation standard under which the SEC must prove that knowledge of the material nonpublic information prompted the trading activity. Brodsky, *supra,* at 939 (section of ITSA that makes liable individuals who trade "while in

ments is a provision broadening section 15(c)(4) of the '34 Act.[4] Prior to the ITSA amendment, section 15(c)(4) provided for publication of SEC findings of violations of the '34 Act's registration[5] and regular reporting[6] requirements by both ordinary issuers and broker-dealers.[7] Upon SEC findings of securities violations, section 15(c)(4) authorized the SEC to issue an administrative order requiring the violator to comply with the rule which the violator was disobeying.[8]

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possession of" material nonpublic information may change generally accepted causation standard). Finally, the ITSA may fail to protect employers whose employees or agents violate the law, although employers generally are exempt under the securities laws from liability by theories of respondeat superior. *Id.* at 939-40.

4. *See* ITSA, *supra* note 1, at § 4 (amending § 15(c)(4) of '34 Act). The ITSA's primary amendment to the '34 Act is the addition of a provision enabling the SEC to seek treble damages for loss that an individual avoids or profit that an individual gains through insider trading. *Id.* at § 2A; *see Insider Trading Sanctions and SEC Enforcement Legislation: Hearing on H.R. 559 Before the Subcomm. on Telecommunications, Consumer Protection and Finance of the House Comm. on Energy and Commerce,* 98th Cong., 1st Sess. 12 (April 13, 1983) (statement of Rep. Rinaldo (treble damages provision should significantly deter insider trading by raising risk of such activity) [hereinafter cited as *House Hearing I*]. The ITSA also amended the '34 Act by increasing, from $10,000 to $100,000, the maximum criminal fine the Justice Department may seek against persons who willfully violate the '34 Act or willfully make certain false statements. ITSA, *supra* note 1, at § 3 (amending § 32 of '34 Act).

5. *See* '34 Act, § 12, 15 U.S.C. § 78l (1982). Once a business lists its securities on a national securities exchange, or a sufficiently large number of persons hold the securities of a business organization that meets certain size criteria, the business organization must file a registration statement pursuant to § 12(b) or § 12(g) of the '34 Act. *Id.; see* Yaeger, *Introduction: Statutory Framework of the 1933 Act Filing Requirements* in PLI, SECURITIES FILINGS: REVIEW AND UPDATE 1983, 23 (P. Yaeger ed. 1983). Section 12(b) of the '34 Act enumerates the information that the issuer must provide to the SEC to make effective transactions of the security. *See* '34 Act, § 12(b), 15 U.S.C. § 78l(b)(1) (1982). *See generally* Austin & Baker, *Registration Statements Under the Securities Exchange Act of 1934: Form 10, Form 8-A, and Form 8-B,* in PLI, SECURITIES FILINGS: REVIEW AND UPDATE 1983, 233-241 (P. Yaeger ed. 1983).

6. *See* '34 Act, § 13, 15 U.S.C. § 78m (1982). Section 13 of the '34 Act requires issuers, as defined in § 12 of the '34 Act, to file quarterly and annual reports and information sufficient to keep current the registration information filed pursuant to § 12 of the '34 Act with the SEC. *Id. See* Yaeger, *supra* note 5, at 22-23 (periodic reporting requirements of '34 Act force issuers to disclose significant developments in their businesses while the businesses' securities are publicly held). *See generally* PLI, SECURITIES FILINGS: REVIEW AND UPDATE 1983 (P. Yaeger ed. 1983) (describing reporting requirement and methods of compliance).

7. *See* '34 Act, § 15(d), 15 U.S.C. § 78(o) (1982). Brokers and dealers in securities must register and follow the periodic reporting requirements of § 13 of the '34 Act. *Id.;* Yaeger, *supra* note 5, at 24. Broker-dealers, unlike ordinary issuers, however, need not meet SEC requirements of annual reports to shareholders or file proxy statements. *Id.*

8. *See* '34 Act, § 15(c)(4), 15 U.S.C. § 78(o)(c)(4) (1982) (SEC may order violator of §§ 12, 13 or 15(d) of '34 Act to comply with violated provision upon administrative finding of noncompliance). Congress first enacted § 15(c)(4) as part of a comprehensive package of reforms of the securities law. *See* H.R. REP. No. 1418, 88th Cong., 2d Sess. 1, *reprinted in* 1971 U.S. CODE CONG. & AD. NEWS 3013, 3013 (Securities Acts Amendments of 1964 extended disclosure requirements, improved qualification and disciplinary procedures and made other changes to securities laws). The House Report does not explain why Congress enacted § 15(c)(4). *Id.* at 3036. Congress, however, apparently envisioned § 15(c)(4) as a limited remedy because the

The ITSA amendment to section 15(c)(4), however, expanded the scope of the section.[9] Section 15(c)(4), as amended, provides for publication of findings and issuance of compliance orders for violations of the '34 Act's proxy and tender offer requirements.[10] The ITSA amendments to section 15(c)(4) also expand the range of persons subject to compliance orders.[11] Under the revised section, the SEC may order compliance of any person who causes a violation of the periodic, proxy, and tender offer filing requirements.[12] Before the ITSA amendments to section 15(c)(4), the SEC could issue compliance orders only against persons who actually violated the registration and regular reporting requirements of the '34 Act.[13] The ITSA

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report stated that the SEC could issue a compliance order and, when necessary, could seek enforcement of the order through a federal district court. *See id.*

9. *See infra* text accompanying notes 10-11 (describing expansion of § 15(c)(4) of '34 Act).

10. ITSA, *supra* note 1, at § 4 (ITSA makes § 15(c)(4) applicable to § 14 violations). *See* '34 Act, § 14, 15 U.S.C. § 78n (1982). Section 14 of the '34 Act grants the SEC authority to regulate proxy solicitations and tender offers. *Id.* The SEC has chosen to regulate proxy solicitations by requiring the party soliciting the proxy to disclose certain information to the shareholders. *See* D. RATNER, SECURITIES REGULATION IN A NUTSHELL 89-90 (1978). The SEC also has imposed disclosurse requirements upon persons seeking to make tender offers. *See* '34 Act, § 14(d), 15 U.S.C. § 78(n)(d) (1982). Although neither the '34 Act nor the implementing rules that accompany the '34 Act define the term "tender offer," a tender offer essentially is an invitation that a bidder makes to the shareholders of a corporation to a tender their shares at a set price. *See* 1 M. LIPTON & E. STEINBERGER, TAKEOVERS & FREEZEOUTS 2-23 (1984). *See generally* Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 HARV. L. REV. 1250 (1973). Section 14(d) of the '34 Act in combination with rule 14d-3 requires anyone preparing to make a tender offer to file a Schedule 14D-1 with the SEC, and hand deliver a copy of the Schedule 14D-1 to the target company and any other bidder that has filed a Schedule 14D-1 which relates to an ongoing tender offer for the same class of securities of the target corporation. '34 Act, § 14(d), 15 U.S.C. § 78n (1982); 17 C.F.R. § 240.14d-3 (1984). *See* M. LIPTON & E. STEINBERGER, *supra* at 2-43. The Schedule 14D-1 is the principal disclosure document in connection with tender offers. PLI, INTRODUCTION TO SECURITIES FILINGS: 1979 (S. Fraidin ed. 1979). In addition to filing Schedule 14D-1 with the SEC, the bidder must provide a copy of the Schedule 14D-1 and telephone notice of the tender offer to each national securities exchange that lists the target company's subject class of securities. *Id.* Finally, the bidder must disseminate essentially all of the information on the Schedule 14D-1, by any of three alternative methods, to the security holders. *Id.*

11. *See* ITSA, *supra* note 1, at § 4 (amending § 15(c)(4) of '34 Act); *infra* notes 12-14 and accompanying text (explaining expansion of category of persons subject to § 15(c)(4) procedures).

12. *See* ITSA, *supra* note 1, at § 4 (SEC may institute § 15(c)(4) proceeding upon notice and opportunity for hearing and issue compliance orders requiring compliance of violators or persons who cause a violation of §§ 12, 13, 14 or 15(d) of the '34 Act). The ITSA makes subject to § 15(c)(4) proceedings not only persons who fail to comply with §§ 12, 13, 14 or 15(d) but also persons who are a cause of the noncompliance because of an omission or act the person knew or should have known would contribute to noncompliaance. *Id.* The ITSA expanded the range of persons subject to § 15(c)(4) proceedings to include individuals other than "controlling persons." *See infra* notes 13-14 and accompanying text (discussing ITSA's expansion of range of persons subject to § 15(c)(4) proceedings).

13. *See* '34 Act, § 15(c)(4), 15 U.S.C. § 78(o)(c)(4) (1982). Although the SEC, under § 15(c)(4), could order compliance only of persons who violated any provision of §§ 12, 13 or

amendment to section 15(c)(4), however, authorizes the SEC to issue compliance orders against persons who knew or should have known that their acts or omissions would contribute to failure of compliance with the '34 Act.[14] Congress, therefore, in amending section 15(c)(4), authorized the SEC

15(d) before the enactment of the ITSA, the SEC also could take disciplinary action against individuals who controlled the violators of §§ 12, 13 or 15(d). *See* '34 Act, § 20, 15 U.S.C. 78(t) (1982) (persons who directly or indirectly control persons who violate '34 Act shall be jointly and severally liable for violator's actions). Section 20 also contains a provision under which an officer, director or owner of securities who hinders, obstructs or delays the filing of information that the '34 Act requires is subject to liability. *Id.* § 20(c). Although the controlling person liability of § 20 of the '34 Act is broad, the SEC recommended expanding the breadth of § 15(c)(4) liability to create liability in individuals who should bear some responsibility for a securities law violation even though such individuals do not qualify as controlling persons under § 20 of the '34 Act. *See* 16 SEC. REG. & L. REP. (BNA) No. 46, at 1826 (Nov. 23, 1984) (SEC recommendation indicates that individuals not meeting § 20 test nonetheless may be liable as "cause" of securities laws violations). The SEC General Counsel asserted that enactment of the cause provision of § 15(c)(4) in the ITSA reflects congressional interest in focusing, under the securities laws, on culpable individuals rather than merely on corporate entities. *Id.*

14. ITSA, *supra* note 1, at § 4. At least one member of the SEC, Commissioner James Treadway, expressed reservation about the application of the "cause" concept in proceeding against individuals under § 15(c)(4) of the '34 Act. *See* Open Meeting of the Securities and Exchange Commission (Februrary 15, 1984) (taped transcript on file at Washington & Lee Law Review) (expressing confusion over meaning of "persons who are a cause" language in proposal that became ITSA, § 4 amendment to § 15(c)(4) of '34 Act) [hereinafter cited as SEC Open Meeting]. Commissioner Treadway noted that the proposal did not clarify whether "cause" referred to "essential cause," "substantial cause," "significant cause," or "but for cause." *Id.* Treadway expressed concern that legislative enactment of the proposal without clarification of the "cause" concept might result in prolonged litigation over the meaning of the "cause" provision within § 15(c)(4). *Id.* Such litigation, Treadway noted, might hamper significantly utilization of the enforcement tool. *Id.* In response to Commissioner Treadway's concern regarding the meaning of "cause" under the proposed § 15(c)(4) amendment, John Fedders, the director of the SEC's Division of Enforcement, which proposed the amendment to § 15(c)(4), explained his understanding of the "cause" concept. *Id.* Fedders said that the "cause" concept would apply only to the persons directly responsible for the misstatement. *Id.* Fedders noted that an officer or director directly engaged in causing a corporation to file a false report or make a materially false statement in a report was one type of individual the SEC might charge under the "cause" concept. *Id.* Fedders explicitly rejected the idea that the SEC would use the "cause" concept, for example, to charge a clerk who delivered to and filed a false 10K report with the SEC. *Id.* In such a case, the SEC would not find the clerk to have caused a false document to be filed. *Id.*

According to Fedders the "cause" concept under the § 15(c)(4) proposal is a higher standard of causation than the standard under which the SEC charges individuals with aiding and abetting securities laws violations. *Id.* Although the "aiding and abetting" standard has been the subject of much litigation, it is well-established that there exist three primary elements for establishing aiding and abetting liability. *See* H. FRIEDMAN, SECURITIES AND COMMODITIES ENFORCEMENT 105-06 (1981) (courts have struggled to define elements necessary to establish aiding and abetting violation); Note, *Liability for Aiding and Abetting Violations of Rule 10b-5: The Recklessness Standard in Civil Damage Actions,* 62 TEX. L. REV. 1087, 1089 (1984) (courts have defined three elements necessary to establish aiding and abetting liability under rule 10b-5) [hereinafter cited as *Liability for Aiding and Abetting].* The three elements of aiding and abetting are that another party must have committed a securities law violation, the defendant must have had some knowledge of that violation, and the defendant must have substantially aided the violation.

to issue administrative compliance orders for violations of the proxy and tender offer requirements and broadened the class of persons against whom the SEC could issue compliance orders.[15]

The SEC's General Counsel, however, has suggested that the ITSA amendment to section 15(c)(4) may have authorized an entirely new remedy.[16] The General Counsel asserted that enactment of the section 15(c)(4) provision enabling the SEC to issue compliance orders against persons who are a "cause" of securities violations evidenced endorsement of SEC focus on culpable individuals rather than solely on corporations.[17] The General Counsel noted that naming individuals as respondents in administrative compliance actions would be appropriate when the failure of compliance resulted from either an individual's affirmative conduct or failure to carry out official corporate duties.[18] By issuing orders against an individual requiring the individual to take steps to effect compliance, the SEC would designate a responsible person accountable for compliance by the corporation.[19] Moreover, the General Counsel suggested that naming an individual would be

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Liability for Aiding and Abetting, supra, at 1089. *See* SEC v. Coffey, 493 F.2d 1304, 1316 (6th Cir. 1974), *cert. denied,* 420 U.S. 908 (1975) (to establish aider and abettor liability third party must have committed securities law violation, accused party must have had general awareness of impropriety of overall acitvity and accused party must have knowingly and substantially contributed to the violation). The state of the law regarding the extent to which an individual's assistance in violative conduct must be knowing and substantial is unsettled. *See Liability for Aiding and Abetting, supra,* at 1097 (courts have had difficulty defining "substantial assistance"). In adjudicating the substantial assistance issue the courts generally have examined the defendant's conduct on a case-by-case basis. *Id. But see* FRIEDMAN, *supra,* at 107 (substantial assistance is not "but for" causation between aid and violation).

Although the director of the Enforcement Division of the SEC asserted that the § 15(c)(4) "cause" concept imposes a higher standard for liability than does the standard under aiding and abetting, the SEC General Counsel stated that, as a practical matter, the circumstances in which the SEC would seek an injunction for aiding and abetting or bring an administrative proceeding under § 15(c)(4) likely would be similar. SEC Open Meeting, *supra.* The director of the Division of Enforcement, John Fedders, suggested that one of the reasons his division proposed the "cause" concept was that the unsettled status of the aiding and abetting theory made the prospect of an alternative enforcement tool attractive. *Id.* In comparing the "cause" concept with the aiding and abetting theory Fedders described the "cause" concept as being clear with regard to general purpose but not as ambiguous and lacking in clarity as the aiding and abetting theory. *Id.*

15. *See supra* text accompanying notes 10-14 (discussing amendment to § 15(c)(4) of the '34 Act).

16. *See supra* notes 17-24 and accompanying text (discussing SEC General Counsel's assertion that ITSA amendment to § 15(c)(4) creates alternate remedy to securities law violations).

17. *Where Should the Buck Stop: Individual Responsibility in SEC Enforcement Actions,* Address to ABA Committee on Federal Regulation of Securities by Daniel Goelzer, General Counsel, Securities and Exchange Commission 17 (Nov. 17, 1984) (stating that ITSA amendment to § 15(c)(4) creates authority in SEC to bar individuals from corporate offices and boards for violations of securities laws) [hereinafter cited as SEC General Counsel].

18. *Id.* at 17-18 (taking action against individual securities laws violators more appropriate than moving against corporate entities in some situations).

19. *Id.* at 17.

appropriate when an individual's self-dealing resulted in a violation of the securities laws or when an individual established procedures that prevented detection of fraud.[20]

Furthermore, the General Counsel asserted that the broad language of section 15(c)(4) authorized the SEC to require individuals to comply upon terms and conditions that the SEC orders.[21] The General Counsel noted that section 15(c)(4) always had permitted the SEC to include terms and conditions in its compliance orders.[22] The General Counsel construed the "terms and conditions" provision of section 15(c)(4) to include forms of ancillary relief, especially when the SEC applies section 15(c)(4) to individual misconduct.[23] The General Counsel thus concluded that the ITSA amendment to section 15(c)(4) enabling the SEC to issue compliance orders against individuals coupled with the existing "terms and conditions" phrase of section 15(c)(4) authorizes the SEC to issue administrative compliance orders barring individuals from corporate offices.[24] The General Counsel's claim that the SEC has authority to bar securities law violators from holding corporate officers is novel.[25] Such a claim arguably is invalid unless the legislative history of

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20. *Id.* at 17-18.

21. *Id.* at 18 (stating that broad language of § 15(c)(4) gives SEC flexibility in fashioning administrative remedies for securities violations).

22. *Id.*

23. *Id.*

24. *Id.* at 19 (broad language of § 15(c)(4) and extension of range of culpable individuals under § 15(c)(4) authorizes SEC to bar persons from corporate office).

25. *See* 16 SEC. REG. & L. REP. (BNA) No. 36, 1490-91 (Sept. 14, 1984) (interview with SEC Commissioner James Treadway). SEC Commissioner Treadway favors the creation of SEC authority to administratively bar securities laws violators but recognizes that the bar remedy would be controversial. *Id.* at 1490. Commissioner Treadway also noted that the possibility of a bar remedy has been part of on-going discussions within the SEC. *Id.* Although the General Counsel interprets the ITSA as authorizing administrative bars under § 15(c)(4), Commissioner Treadway stated that legislation would be necessary to give the SEC express authority for administrative bars. *Id.* at 1491. In discussing the impact of the ITSA, Treadway did not state whether the ITSA provided administrative bar authority. *See id.* Although the concept of administratively barring individuals from corporate offices and directorships is new, the SEC has obtained, through consent decrees, the agreement of a number of individuals to refrain from holding corporate posts. *See* SEC General Counsel, *supra* note 17, at 3-4. The SEC, under its authority to seek injunctive relief against securities violators in federal court, has handled at least twenty cases in which the respondents agreed not to hold some corporate office for a specified period of time. *Id.* at 4; *see id.* at 20-26 (digest of cases in which SEC obtained bar from service as officer or director of corporation). This affirmative relief from securities violations is one of several different forms of ancillary relief that the SEC has sought in recent years. *See* Dent, *Ancillary Relief in Federal Securities Law: A Study in Federal Remedies,* 67 MINN. L. REV. 865, 867 (1983) (SEC has obtained increasingly broad equitable remedies for violations of securities laws). Ancillary relief encompasses remedies not expressly statutorily authorized, such as disgorgement of profits, restitution and recission to rectify past wrongs. *See id.* at 930-933 (disgorgement, restitution and recession are long-established equitable remedies that may significantly help enforcement of securities laws). Other forms of ancillary relief seek to prevent future violations of the securities laws. *Id.* at 933. Relief designed to deter future violations includes removal and appointment of directors, appointment of special agents with specific duties to corporate boards, and orders to implement specific procedures to insure proper

the amendment, the statutory authority of the SEC, and the policy goals behind the federal securities laws provide strong support for the SEC General Counsel's position.[26]

The legislative history of the ITSA amendment to section 15(c)(4) reveals that neither Congress nor the SEC intended explicitly to create an administrative bar remedy that the SEC may utilize against violators of the '34 Act to prevent violators from holding corporate offices or directorships.[27] The SEC has recognized that the purpose of section 15(c)(4) is to enable the SEC to force the correction of certain filings that contain false or misleading statements or inaccuracies.[28] In the past the SEC, acting under section

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disclosure of information. *Id.* at 933-39. Although no statutory provision exists in the securities laws for the granting of ancillary forms of relief, courts have found authority for granting ancillary relief in the fact that courts sit as courts of equity when the SEC seeks relief against alleged securities laws violators. Treadway, *SEC Enforcement Techniques: Expanding and Exotic Forms of Ancillary Relief,* 32 WASH. & LEE L. REV. 637, 639 (1975); *see* '34 Act, § 21(e), 15 U.S.C. § 78(u)(e) (1982) (SEC may bring action in federal district court to enjoin violation of federal securities laws). When serving as courts of equity, the courts have deemed themselves to have broad powers to fashion equitable remedies. Treadway, *supra,* at 639. Criticism has developed, however, concerning the expansion in scope and frequency of the granting of ancillary relief. *See* Dent, *supra,* at 961 (defining remedies available for violations of securities laws is primarily congressional function). Professor Dent notes that the extensive array of express remedies that Congress provided in the securities laws tends to indicate that Congress provided remedies it desired and withheld those it did not desire. *Id.; see* Matthews, *Recent Trends in SEC Requested Ancillary Relief in SEC Level Injunctive Actions,* 31 BUS. LAW. 1323, 1324 (1976) (SEC has obtained inappropriate remedies in consent decrees). Matthews attributes the improper extension of ancillary relief to the fact that the application of ancillary relief in securities law has developed primarily through consent decrees rather than adjudicated cases in the courts. Matthews, *supra,* at 1324-25. Thus, there have been no outside forces to restrain the SEC in its pursuit of novel forms of relief, *Id.* at 1325 (SEC enforcement staff needs "education" concerning appropriate enforcement devices). Professor Dent asserts that judges have a responsibility to scrutinize proposed consent decrees before approval to ensure that the proposed consent decree is the appropriate remedy. Dent, *supra* at 947. Professor Dent recognizes, however, that when the two parties offer a consent decree for judicial approval, the court is unlikely to have the resources or time to investigate closely the ramifications of the decree. *Id.* at 947-48.

26. *See* Administrative Procedure Act, § 10(e)(2)(E), 5 U.S.C. § 706(2)(E) (1982) (reviewing court should decide all relevant questions of law and interpret statutory provisions and may set aside agency conclusions in excess of statutory authority). Where the reviewing court is attempting to interpret a statute or part of a statute that is not a term of art with a definite meaning, and the term draws its meaning from the statute in which the term appears, the reviewing court must read the statute in terms of the wrong sought to be corrected and the end to be obtained). NLRB v. Hearst, 322 U.S. 111, 124 (1944) (quoting *South Chicago Coal & Dock Co. v. Bassett,* 309 U.S. 251, 259 (1940)). The Supreme Court in *NLRB v. Hearst* looked to the terms, purposes and history of the legislation involved to interpret the statute in question. *See id.*

27. *See infra* notes 28-48 and accompanying text (discussing drafters' intent in amending § 15(c)(4) of '34 Act).

28. *See* SEC Open Meeting, *supra* note 14 (remarks of director of Division of Enforcement) (SEC has used § 15(c)(4) historically as means to compel issuers to correct inaccurate periodic reports). Another member of the SEC pointed out that whereas an injunctive proceeding which the SEC brings pursuant to § 21 of the '34 Act acts toward preventing a repetition of

15(c)(4), has required issuers to correct materially false or misleading filings.[29] In contrast, the SEC, acting under section 21(d) of the '34 Act, has obtained injunctions against violators of the securities laws to prohibit those persons from committing future violations of the '34 Act.[30] Consequently, the

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the violative conduct, a § 15(c)(4) proceeding looks toward correcting a filing. *Id.* The legislative history of the original § 15(c)(4), which Congress passed as part of the 1964 Amendments to the '34 Act, supports the idea that the function of § 15(c)(4) is to provide a forum and method for ordering corrective disclosure of materially false, misleading or inaccurate filings. *See* S. REP. No. 379, 88th Cong., 1st Sess. 25 (1963) (accompanying S. 1642, 88th Cong., 1st Sess. (1963)), *reprinted in* 2 FEDERAL BAR ASSOCIATION SECURITIES LAW COMMITTEE, FEDERAL SECURITIES LAW: LEGISLATIVE HISTORY 1933-1982, at 1831 (1983) (SEC may issue order requiring compliance where issuer fails to comply with certain disclosure requirements). The Senate report noted further that the administrative compliance order provision of § 15(c)(4) would benefit shareholders by acting as a means of apprising those shareholders of materially false or misleading filings regarding their securities. *Id.* at 1832. Further support for the contention that the purpose of § 15(c)(4) is to effectuate corrective filing is found in the Senate Committee on Banking and Currency's rejection of an alternative to § 15(c)(4). *Id.* The Banking and Currency Committee rejected the alternative, a process by which trading of a violator's securities could be suspended indefinitely, because the alternative would relieve the violating issuer of a duty to correct the false or misleading filings. *Id.* at 1831-32. The Senate Committee noted further that the SEC could obtain enforcement of an order issued pursuant to § 15(c)(4) by application to a United States district court for enforcement of the SEC compliance order. *Id.* at 1832.

29. *See* SEC Open Meeting, *supra* note 14 (SEC has used § 15(c)(4) to require issuers to correct periodic reports which are inaccurate, false or misleading); *see also House Hearing, supra* note 4, at 125 (written statement of Dennis Block) (SEC uses administrative proceedings conducted pursuant to § 15(c)(4) to require issuers to correct prior filings and order future compliance); *id.* at n.40 (listing SEC 15(c)(4) proceedings). *See In the Matter of Ronson Corp.*, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) 83,275, at 85,471-473, 85,476 (1982) (where corporation allegedly inflated inventory value improperly and allegedly improperly recognized sales as revenues in interim financial reports, corporation consented to SEC order requiring corporation to comply with reporting requirements of § 13(a) of '34 Act). Following *In the Matter of Ronson Corp.*, in which Ronson Corporation consented to the issuance of an order requiring compliance with § 13 of the '34 Act, the Ronson Corporation again became the subject of an SEC enforcement action. *See SEC v. Ronson Corp.*, [1983-84 Transfer Binder] Fed. Sec. L. Rep. (CCH) 99,464, at 96,652 (D.N.J. 1983). In *SEC v. Ronson Corp.*, Ronson Corporation allegedly failed to state in quarterly and annual reports filed pursuant to § 13(a) of the '34 Act that Ronson Corporation's largest customer had closed down production, suspended purchases from Ronson and was unlikely to resume such purchases before the filing date of the next quarterly report. *Id.* The SEC filed a civil action in the United States District Court for the District of New Jersey seeking an order directing Ronson Corporation to comply with the SEC's previously issued administrative compliance order. *Id.* To avoid litigation Ronson consented, without admitting or denying the allegations of the SEC's complaint, to the issuance of a judicial order directing Ronson to comply with the order that the SEC had issued previously directing Ronson to comply with § 13(a) of the '34 Act. *Id.* at 96,653.

30. *See* HOUSE REPORT, *supra* note 1, at 2279 (most widely used of SEC's alternative enforcement remedies is authority to bring action for injunctive relief under § 21(d) of '34 Act); *SEC Oversight and Technical Amendments: Hearing of H.R. 4774 Before the Subcomm. on Telecommunications, Consumer Protection and Finance of House Comm. on Energy and Commerce*, 98th Cong., 2d Sess. 35 (Feb. 23, 1984) (statement of John S. R. Shad, Chairman of SEC) (nearly 60% of 261 enforcement cases that SEC brought during 1983 were injunctive actions) [hereinafter cited as *House Hearing II*]; *see also* '34 Act, § 21(d), 15 U.S.C. § 78(u)(d) (1982). Section 21(d) of the '34 Act authorizes the SEC to seek, in federal district court, a

corrective purpose of a section 15(c)(4) compliance order is distinguishable from the deterrent purpose of a section 21(d) injunctive action.[31] The administrative bar remedy that the SEC General Counsel has suggested that the ITSA authorized, therefore, does not appear to serve the corrective purpose of section 15(c)(4) and, in fact, may be more consistent with the deterrent purpose of the injunctive action.[32] Whereas the General Counsel's

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permanent or temporary injunction or a restraining order prohibiting the enjoined party from future violation of the securities laws. '34 Act, § 21(d), 15 U.S.C. § 78(u)(d) (1982). Section 21(d) authorizes the SEC to seek such injunctions whenever the SEC believes that any person is engaging or is about to engage in any practice that is a violation of the '34 Act or rules which the SEC has promulgated pursuant to the '34 Act. *Id.* When the SEC makes a "proper showing" of the need for an injunction, the federal district court will issue injunctive relief. HOUSE REPORT, *supra* note 1, at 2279. Federal courts generally have interpreted the "proper showing" requirement to comprise demonstration of a previous violation and reasonable likelihood of a future violation. *Id.* There is a perception that courts are increasingly less willing to find that the SEC has established a showing of a reasonable likelihood of future violations in actions for § 21(d) injunctive relief. *See* SEC Open Meeting, *supra* note 14 (statement of Daniel Goelzer, SEC General Counsel) (SEC facing increasing number of cases where court finds past or present violation of securities law but is unwilling to find reasonable likelihood of future violations); *House Hearing I, supra* note 4, at 123-24 (written testimony of Dennis Block) (increasing judicial scrutiny of SEC requests for injunctive relief has made showing reasonable likelihood of future violations more difficult). Because the SEC's requests for injunctive relief under § 21(d) of the '34 Act invokes the courts' equity jurisdiction, the courts have used the equity power to fashion appropriate relief. *See* HOUSE REPORT, *supra* note 1, at 2280 (equity jurisdiction of court enables court to fashion appropriate remedy); *supra* note 25 (describing ancillary relief that SEC has obtained for securities laws violations). *See generally* FRIEDMAN, *supra* note 14, at 53-67 (discussing kinds of ancillary relief for securities laws violations). Friedman notes that an ancillary remedy may often originate and become established by being included in a number of consent decrees before a court examines the validity of the remedy in contested litigation. *Id.* at 53.

31. *See* SEC Open Meeting,-supra note 14 (SEC generally brings administrative proceeding under § 15(c)(4) to correct filing whereas SEC brings injunctive action pursuant to § 21(d) to prevent future violations of securities laws). In practice the corrective nature of § 15(c)(4) proceedings and the deterrent nature of § 21(d) injunctive actions have become muddled by the SEC's extensive procurement of ancillary relief obtained with the consent of the issuer. *See House Hearing I, supra* note 4, at 125 (written statement of Dennis Block) (§ 15(c)(4) administrative proceedings resemble § 21(d) permanent injunctions because SEC has used both remedies to require issuers to correct inaccurate filings and comply with reporting provisions of federal securities laws); *id.* at 127 (SEC has obtained broad range of ancillary relief in settlement of § 15(c)(4) proceedings). Dennis Block, in testimony before the House Subcommittee on Telecommunications, Consumer Protection and Finance, asserted that the SEC had obtained ancillary relief, in settling § 15(c)(4) proceedings by interpreting § 15(c)(4)'s grant of authority to order compliance on such terms and conditions as the SEC may specify as enabling the SEC to impose the kinds of ancillary remedies that the SEC has obtained in consent decrees issued pursuant to SEC injunctive actions. *Id.* at 126-27. Block contended further that ancillary remedies accompanying § 15(c)(4) administrative compliance orders likely would be authorized where the SEC had not obtained the consent of the issuer to the particular administrative order. *Id.* at 127. Block noted that the possibility that Congress intended to authorize the SEC to circumvent the courts and issue essentially administrative injunctions with intrusive ancillary remedies was unlikely. *Id.*

32. *See* SEC General Counsel, *supra* note 17, at 19 (bar orders may be more effective in

interpretation of the "individuals who cause a violation" amendment to section 15(c)(4) apparently is inconsistent with the section's corrective purpose, the inclusion of section 14 violations within the ambit of section 15(c)(4) proceedings is not inconsistent with the purpose of section 15(c)(4).[33]

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certain circumstances than criminal fines, imprisonment or contempt actions for dealing with repeat violators).

33. *See* ITSA, *supra* note 1, § 4 (addition of § 14 violations to list of violations subject to § 15(c)(4) administrative proceedings). The inclusion of violations of the proxy and tender offer requirements under § 14 of the '34 Act gives the SEC greater flexibility in dealing with proxy and tender offer violators. HOUSE REPORT, *supra* note 1, at 2285. Flexibility in enforcing the proxy and tender offer requirements of § 14 is beneficial because of the likelihood of instances in which the SEC may choose not to expend the resources to pursue a judicial injunction. *Id.* The House Committee on Energy and Commerce, which recommended the ITSA to the entire House of Representatives for passage, noted that the traditional injunctive remedy might prove too costly to pursue in some situations. *Id.* Moreover, the Committee on Energy and Commerce stated that issuance of an injunction might be a more far-reaching remedy than the SEC may desire in certain circumstances. *Id.* The Committee's argument concerning the injunctive remedy seemingly carries little weight, however, because the effect of an administrative compliance order and a judicial injunction is the same. *House Hearing I, supra* note 4, at 125 (written statement of Dennis Block). Both an administrative order and a judicial injunction compel the defendant to comply with the securities laws. *Id.* Unlike the administrative compliance order, however, the injunction carries the threat of a criminal contempt citation if the enjoined party fails to obey the injunction. *Id.* Additionally, unlike the administrative compliance order, an injunction may disqualify the respondent from complying with other sections of the securities laws. *Id.* at 126.

The addition of § 14 violations to the violations subject to § 15(c)(4) proceedings also eliminates an anomaly in the securities laws. *See id.* at 128-29 (written statement of Dennis Block) (absence of § 14 of '34 Act in violations actionable under § 15(c)(4) of '34 Act creates anomaly of uneven enforcement of securities laws). The anomaly frequently occurs in contested tender offer situations where a bidder acquires five percent or more of the target's outstanding shares prior to making the tender offer. *Id.* at 130.

After acquiring at least five percent of the target's outstanding shares the bidder must file a Schedule 13D with the SEC pursuant to § 13 of the '34 Act. *Id.; see* '34 Act, § 13(d)(1), 15 U.S.C. § 78(m)(d)(1) (1982); 17 C.F.R. § 240.13d-1 (1984) (person who acquires at least 5% of class of registered securities must file information regarding purchaser, number of shares, funds used to purchase securities and intent, if any, to take control of business). Upon making the tender offer, the bidder normally will update the status of the § 13 filing on the necessary § 14 filing. *House Hearing I, supra* note 4, at 130; *see* '34 Act, § 14(d)(1), 15 U.S.C. § 78(n)(d)(1) (1982) (persons seeking to make tender offers must file with SEC pursuant to rules that SEC promulgates). The bidder who contests the attempted takeover also must file pursuant to § 14. *House Hearing I, supra* note 4, at 130; *see* '34 Act, § 14(d)(4), 15 U.S.C. § 78(n)(d)(4) (1982) (persons seeking to recommend acceptance or rejection of tender offer must do so pursuant to SEC rules and regulations regarding contested takeover attempts). The consequence of the filing scheme and the scope of § 15(c)(4) was that under § 15(c)(4) the SEC could act on the bidder's filings and could not act on the target company's filings. *House Hearing I, supra* note 4, at 130. This result undermined basic congressional intent that SEC regulation of tender offers be impartial and balanced. *Id.* at 130-31; *see* S. REP. No. 550, 90th Cong., 1st Sess. 3 (1967) *reprinted in* 2 FEDERAL BAR ASSOCIATION SECURITIES LAW COMMITTEE, FEDERAL SECURITIES LAWS: LEGISLATIVE HISTORY 1933-1982, at 2109 (1983) (drafters of bill regulating tender offers made effort not to tip balance of regulation in favor of either management or offeror) [hereinafter cited as S. REP. No. 550]. The Senate Committee on Banking and Currency, which considered the amendment adding subsection 14(d) to the '34 Act, attempted to balance the

The addition of section 14 to the list of '34 Act sections for which the SEC may bring a section 15(c)(4) proceeding merely adds proxy and tender offer filings to the filings subject to section 15(c)(4) proceedings and does not appear to contravene the corrective purpose of section 15(c)(4).[34]

Although the SEC General Counsel's interpretation of the ITSA amendment to section 15(c)(4) appears to conflict with the corrective purpose of section 15(c)(4), such an interpretation might be warranted if the drafters of the ITSA intended to alter substantially the purpose of section 15(c)(4).[35]

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impact of the filing requirements to avoid favoring either the bidder or the target because the Banking Committee believed that takeovers were not necessarily always economically beneficial or always economically detrimental to the corporation. *Id.* The ITSA amendment that brings § 14 under the coverage of § 15(c)(4), therefore, helps to eliminate potential confusion in the enforcement of filing requirements under the '34 Act and increases the uniformity of application of the various enforcement tools of the securities laws.

An additional anomaly resulted from the exclusion of § 14 from the terms of § 15(c)(4). *See House Hearing I, supra* note 4, at 128 (omission of § 14 from § 15(c)(4) caused unequal enforcement of reporting provisions because Congress split disclosure requirements legislatively between § 13 and § 14). As an example of this anomaly, the SEC could have ordered correction of an inaccurate annual report that an issuer filed pursuant to § 13(a). *Id.* The SEC, however, could not have ordered correction of a proxy statement filed pursuant to § 14 that contained the same inaccuracies as the annual report. *Id.*

34. *See* 16 SEC. REG. & L. REP. (BNA) No. 7, 267 (Feb. 17, 1984) (addition of § 14 to § 15(c)(4) proceedings would enable SEC to force persons to correct false and misleading statements made with respect to proxy solicitations, proxy contests, shareholder proposals and tender offers). The Chairman of the SEC, John S. R. Shad, questioned whether Congress intentionally had omitted § 14 from § 15(c)(4) when Congress first passed 15(c)(4). *See* SEC Opening Meeting, *supra* note 14 (statement of Chairman Shad). The director of the SEC's Division of Enforcement noted that Congress twice had not included § 14 violations within the provisions of § 15(c)(4). *Id.* (statement of John Fedders). The director asserted that when Congress passed § 15(c)(4) in 1964, Congress inadvertantly neglected to include § 14 within the range of violations subject to § 15(c)(4). *Id.* The director also asserted that Congress briefly considered making tender offer reporting violations under § 14(d) and (e) of the '34 Act subject to § 15(c)(4) proceedings when Congress passed the Williams Act regulating tender offers in 1968. *Id. See* Williams Act, Pub. L. No. 90-439, 82 Stat. 454 (codified as amended at 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1982)). The SEC General Counsel, Daniel Goelzer, noted that congressional reluctance to include proxy violations within the scope of § 15(c)(4) proceedings may have resulted from the '34 Act drafters' perception that requiring correction of proxy filings would be unnecessary. SEC Open Meeting, *supra* note 14. The drafters of the '34 Act may have conceived of § 14 as affecting only a single transaction, the proxy vote, and, therefore, determined that post-vote correction of the proxy statement would serve little purpose. *Id.* Presuming that the drafters of § 15(c)(4) also perceived of § 14 as dealing with a single transaction, the § 15(c)(4) drafters' omission of § 14 reflects the drafters' strong endorsement of the corrective purpose of § 15(c)(4). The SEC General Counsel noted, however, that since passage of the '34 Act, proxy filings clearly no longer relate to a single proxy vote but have become instruments that persons use, in part, to analyze the financial conditions of companies. *Id.* The utilization of § 14 filings by potential investors and market analysts, therefore, negates the conclusion that correction of proxy and tender offer filings would serve no useful purpose. *Id.*

35. *Contra* 5 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.16, at 399 (2d ed. 1984) (typical formulation of judicial review of agency construction of statute) (quoting *United States v. Clark,* 454 U.S. 555, 565 (1982)). The United States Supreme Court announced in *United*

Little support exists, however, for the idea that either the SEC or Congress intended the amendment to section 15(c)(4) to alter the fundamentally corrective nature of section 15(c)(4).[36] The SEC, in discussing the proposed expansion of section 15(c)(4), construed its proposal narrowly.[37] The director of the Division of Enforcement and the General Counsel emphasized repeatedly that, in adding the "cause" concept, the SEC was attempting only to clarify its authority to proceed against individuals who cause a violation of sections 12, 13, 14 or 15(d) of the '34 Act.[38] Moreover, the director of the Division of Enforcement asserted that the SEC reasonably could have brought a section 15(c)(4) proceeding against an individual prior to the passage of the ITSA.[39] The SEC, in proposing the "cause" concept amendment to section 15(c)(4), therefore, intended merely to make explicit the notion that the SEC could bring administrative proceedings under section 15(c)(4) against individuals and did not intend to authorize indirectly an administrative bar by altering the corrective nature of section 15(c)(4) to serve a deterrent function.[40]

Also indicative of the SEC's intent in proposing the ITSA amendment to section 15(c)(4) was the SEC's decision not to recommend cease and desist authority along with the amendment to section 15(c)(4) in its proposal to Congress for legislation.[41] The SEC considered and rejected the idea of

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States v. Clark that an administrative agency's construction of statute is due great judicial deference, especially when the interpretation has been well-established. 454 U.S. 555, 565 (1982).

36. *See infra* notes 37-39 and accompanying text (discussing SEC's assurance that proposal to amend § 15(c)(4) would not alter substantially purpose of § 15(c)(4)).

37. *See* 16 SEC. REG. & L. REP. (BNA) No. 9, 457 (March 2, 1984) (amendments to § 15(c)(4) are purely "technical").

38. *See* SEC Open Meeting, *supra* note 14 (statement of John Fedders) (SEC proposal would expand § 15(c)(4) to make clear that SEC has authority to name individuals under that section); *id.* (legislative proposal would clarify SEC's authority to charge individuals in administrative proceedings); *id.* (only purpose of "cause" concept is to seek clarification of SEC authority); *id.* (statement of Daniel Goelzer) (§ 15(c)(4) amendment proposal is attempt to make clear SEC's authority to proceed against individuals in administrative context); *id.* (§ 15(c)(4) proposal is not attempt to create category of remedy substantially different from aiding and abetting liability against individuals).

39. *See id.* (statement of John Fedders) (SEC could make reasonable argument that without amending § 15(c)(4) SEC has authority to bring administrative proceedings against individuals). Fedders noted that the SEC had not and, as a practice, did not charge individuals administratively for violations of the '34 Act. *Id.* None of the SEC members present at the open meeting challenged Fedders regarding the SEC's pre-ITSA authority to charge individuals administratively with violations of the '34 Act. *Id.* None of the SEC members suggested, however, that the SEC test its authority to bring an administrative action under § 15(c)(4) against an individual before seeking legislation to clarify that authority. *Id.*

40. *See supra* notes 37-39 and accompanying text (purpose of proposing "cause" concept was to clarify SEC authority to bring administrative actions against individual violators of '34 Act); *supra* notes 28-34 (SEC did not propose § 15(c)(4) amendments to alter corrective purpose of that section).

41. *See House Hearing II, supra* note 30, at 344 (memorandum summarizing results of review of adequacy of SEC enforcement remedies and sanctions), *reprinted in* 16 SEC. REG. & L. REP. (BNA) No. 9, at 456 (March 2, 1984); *infra* note 43 and accompanying text (discussing

requesting Congress to give the SEC authority to issue formal cease and desist orders against violators of the '34 Act.[42] The SEC noted that recommendation of cease and desist authority might delay passage of the ITSA because unlike the amendment to section 15(c)(4), which the SEC declared to be "technical in nature", a cease and desist proposal could create controversy.[43] Clearly, therefore, the SEC did not envision the amendment to section 15(c)(4) as creating the broad, new remedy that the General Counsel has suggested now exists.[44]

In considering the ITSA amendment to section 15(c)(4) Congress reasoned that making explicit the SEC's authority under section 15(c)(4) to proceed against individuals would be beneficial because SEC experience had established that corporate officers, directors or other individuals often may be responsible for an issuer's violation of section 12, 13, 14 or 15(d), even if the individual himself does not violate the securities laws.[45] Congress reiterated the SEC's assertion that the section 15(c)(4) amendment merely clarified the SEC's authority to proceed against individuals in an administra-

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SEC's concern that inclusion of request for cease and desist authority in proposal for legislation might delay passage and implementation of § 15(c)(4) amendments).

42. SEC Open Meeting, *supra* note 14 (statement of John Fedders). The consideration and rejection of asking Congress for cease and desist authority was a part of the SEC's more than two year review of the adequacy of its enforcement remedies and sanctions. *Id.* The SEC examined and reported on four proposals. *Id.* Those four proposals were expansion of § 15(c)(4) to encompass persons subject to § 14 reporting requirements, expansion of § 15(c)(4) to enable the SEC to proceed against persons who are a cause of a violation of the '34 Act's reporting requirements, authority to issue cease and desist orders againt certain violators of the '34 Act, and authority to issue civil monetary penalties. *SEC Review of Enforcement Proceedings, Proposed Legislation on Administrative Proceedings, FOIA Privilege,* 16 SEC. REG. & L. REP. (BNA) No. 9, at 456-57 (March 2, 1984) [hereinafter cited as *Review of Enforcement Remedies*].

43. *See Review of Enforcement Remedies, supra* note 42, at 457 (cease and desist authority proposal might complicate smooth passage of pending securities legislation). The SEC feared that proposing cease and desist authority might delay rapid passage of the ITSA, which the House had passed in 1983, and which was under consideration in the Senate. *Id.; supra* note 1 (ITSA originally passed House of Representatives in September 1983). Moreover, the SEC favored amending § 15(c)(4) as opposed to attempting to gain cease and desist authority because of the relative likelihood of passage of § 15(c)(4) amendments compared to the likelihood of passage of potentially controversial cease and desist authority. *Review of Enforcement Remedies, supra* note 42, at 457.

44. *See Review of Enforcement Remedies, supra* note 42 at 457 (proposed amendments to § 15(c)(4) are technical and are not likely to create controversy during congressional consideration). *But see* SEC General Counsel, *supra* note 17, at 15 (broad language of § 15(c)(4) coupled with ITSA's extension of § 15(c)(4) to individuals authorizes SEC to bar individuals from holding corporate offices and directorships). In written testimony before the House Subcommittee on Telecommunications, Consumer Protection and Finance regarding the ITSA, Dennis Block foreshadowed the controversy surrounding § 15(c)(4). *See House Hearing I, supra* note 4, at 124, 132 (Congress should pass legislation resolving inconsistencies created by § 15(c)(4), limiting range of remedies under § 15(c)(4) and describing situations in which § 15(c)(4) remedy is available to offset ambiguities in section).

45. *See* 130 CONG. REC. H7758 (daily ed. July 25, 1984) (individual corporate managers may bear ultimate responsibility for issuer's violations of '34 Act).

tive context.[46] The amendment, therefore, removed all doubt that the SEC may bring a section 15(c)(4) proceeding against individuals and not just corporate entities.[47] The legislative history of the ITSA amendment to section 15(c)(4) indicates, however, that the SEC proposed and Congress passed the ITSA with no explicit intention to authorize the SEC to administratively bar individuals who violate the '34 Act from ordinary corporate boards and offices.[48]

Although Congress did not intend explicitly to create a new form of administrative remedy, Congress did intend to authorize administrative proceedings againt individuals who cause violations of the '34 Act.[49] If a general power to bar is within the administrative power of the SEC, section 15(c)(4), as the General Counsel suggested, may authorize the SEC to bar individuals who have violated the '34 Act from corporate office.[50] Section 15(c)(4)

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46. *See* 130 CONG. REC. S8913 (daily ed. June 29, 1984) (Senate version of ITSA clarifies SEC's authority to proceed under § 15(c)(4) against individuals); 130 CONG. REC. H7758 (daily ed. July 25, 1984) (amendment clarifies SEC's authority under § 15(c)(4) to charge as respondents, officers, directors and other individuals who are a cause of failure of compliance with '34 Act).

47. *See* 130 CONG. REC. H7758 (daily ed. July 25, 1984) (§ 15(c)(4) amendment defines SEC's authority to issue compliance orders against individuals); 130 CONG. REC. S8913 (daily ed. June 25, 1984) (statement of Sen. D'Amato). Senator D'Amato, who sponsored the Senate version of the ITSA, alleged that the § 15(c)(4) amendment was consistent with the SEC's practice of acting against individuals who violated the '34 Act. *Id.* Prior to the ITSA's enactment, considerable support existed for the notion that Congress intended the SEC to use § 15(c)(4) compliance orders against corporate entities, rather than individuals. *See House Hearing, supra* note 4, at 131 (written statement of Dennis Block) (SEC's pre-ITSA attempts to proceed against individuals under § 15(c)(4) constitute expansive reading of subsection); *see also In re Spartek, Inc.*, [1979 Transfer Binder] FED. SEC. L. REP. (CCH) 81,961, at 81,409 n.5 (1979) (Karmel, Comm'r., dissenting). In *In re Spartek, Inc.*, Commissioner Karmel questioned whether the SEC could bring a § 15(c)(4) action against an individual because § 15(c)(4) applied to persons with obligations under §§ 12, 13 or 15(d), and these actions generally establish obligations of entities rather than individuals. [1977 Transfer Binder] Fed. Sec. L. Rep., at 81,409 n.5. The Section of Corporation, Banking and Business Law of the ABA opposed the ITSA's amendment authorizing the SEC to bring § 15(c)(4) proceedings against individuals on three grounds. *See Comment Received on Proposed Expansion of SEC Administrative Powers*, FED. SEC. L. REP. (CCH) No. 1085 pt. 1, at 6 (Aug. 15, 1984) (ABA committee asserted three objections to § 15(c)(4) amendment) [hereinafter cited as *Comment on Proposed Expansion*]. The Section asserted that the SEC did not have jurisdiction over controlling persons, as defined in § 20 of the '34 Act, which the Section deemed necessary to bring properly an administrative action against individuals under § 15(c)(4). *Id.* Additionally, the Section alleged that the amendment to § 15(c)(4) would complicate rather than simplify enforcement because individuals would tend to litigate rather than settle more often than corporations. *Id.* Finally, the ABA Section of Corporation, Banking and Business Law found that the naming of individuals as respondents was punitive in nature and, therefore, contrary to the corrective disclosure purpose of the statute. *Comment on Proposed Expansion, supra* at 6.

48. *See supra* notes 28-47 and accompanying text (discussing legislative history of § 15(c)(4) amendment).

49. *See supra* note 47 and accompanying text (SEC has authority to bring administrative proceedings against individuals under § 15(c)(4)).

50. *See* Gilbertville Trucking Co. v. U.S. 371, U.S. 115, 130 (1960) (where agency has discretion to choose remedy to apply to particular facts of each case, judicial review is limited

provides that the SEC may order a securities law violator to comply with the '34 Act under terms and conditions that the SEC specifies.[51] If these terms and conditions include various forms of ancillary relief,[52] including barring individuals from office, then the SEC has the power under section 15(c)(4) to bar individuals from corporate office for securities violations.[53]

The statutory scheme of the securities laws, however, negates the conclusion that the ITSA section 15(c)(4) amendment authorizes the SEC to bar individuals from ordinary corporate boards and offices.[54] In general, when Congress intended the SEC to have the power to bar individuals from associating with certain corporate entities, Congress made the power explicit in the statute.[55] By implication, in areas where Congress did not grant the SEC authority to bar, Congress intended that the SEC not enforce the securities laws by use of administrative bars.[56] Although provisions for statutory bars exist in some areas of federal securities laws,[57] no statutory authority exists for the SEC to bar an individual from holding a corporate office in an ordinary publicly held corporation.[58] Under the Securities

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to determination of whether agency made allowable judgment by choosing particular remedy). *But see* Administrative Procedure Act § 9(a), 5 U.S.C. § 558(b) (1982) (agency may not impose sanction unless within jurisdiction delegated to agency and as authorized by law).

Although § 558 of the Administrative Procedure Act restricts agencies in applying sanctions, the Supreme Court's narrow interpretation of § 558(b) has diluted the potential impact of the section. *See* Pan Am. World Airways, Inc. v. United States, 371 U.S. 296, 312 n.17 (1963) (Civil Aeronautics Board's power to order divestiture of corporation violating Sherman Act need not be explicit in agency's authority). The Supreme Court has likened agencies' power to fashion appropriate relief to the power of courts to fashion equitable remedies under the Sherman Act. *Id.*

51. '34 Act, § 15(c)(4), 15 U.S.C. § 78(o)(c)(4) (1982) (compliance order under § 15(c)(4) may recite terms, conditions and time within which violator must comply with '34 Act). No reported cases exist in which the SEC has issued an order without the respondent's consent construing the terms and conditions provision of § 15(c)(4) to obtain relief beyond simple compliance orders.

52. *See supra* note 25 and accompanying text (discussing ancillary relief under securities laws).

53. *Cf.* Gilbertville Trucking Co. v. United States, 371 U.S. 115, 129 (1960) (where statute authorized agency to order violator to take such action that agency believes may be necessary to prevent continuance of violation, agency is free to choose appropriate remedy).

54. *See infra* notes 59-75 and accompanying text (discussing provisions of securities laws in which SEC has statutory authority to bar individuals from associating with certain corporate entities).

55. *See infra* notes 59-75 and accompanying text (examples of situations in which SEC may bar individuals).

56. *See* Dent, *supra* note 25, at 901-902 (Congress intended not to authorize use of certain ancillary remedies where Congress omitted those remedies from securities laws).

57. *See infra* notes 58-75 and accompanying text (discussing areas of securities laws in which SEC has statutory bar authority).

58. *See* SEC General Counsel, *supra* note 17, at 9 (no explicit statutory authority exists for SEC to bar individuals from boards and offices of ordinary publicly held corporations); Treadway, *supra* note 25, at 679 (while complete bar from corporate world of individuals who violate any provision of federal securities laws would be effective, such remedy clearly is not within SEC's enforcement powers).

Investor Protection Act (SIPA),[59] for example, the SEC may bar individuals associated with a broker-dealer in Securities Investor Protection Corporation liquidation[60] from holding corporate office with another broker-dealer.[61] Moreover, the SIPA specifically authorizes an SEC bar and declares that a bar may be appropriate in five other circumstances.[62] The SIPA authorizes a bar where an individual wilfully caused the filing of a false or misleading registration statement.[63] Additionally, the SEC may bar an individual who has been convicted of certain types of felonies or misdemeanors within ten years of the SEC enforcement action.[64] The SEC also may bar an individual whom a court has enjoined from acting as an investment adviser, underwriter, broker or other person required to be registered under the Commodities Exchange Act.[65] Moreover, a bar may be appropriate where the individual wilfully has violated any provision of the Securities Act of 1933,[66] the Investment Advisers Act of 1940,[67] the Investment Company Act of 1940,[68] the Commodities Exchange Act[69] or the Securities Exchange Act.[70] Finally,

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59. 15 U.S.C. §§ 78aaa-78lll (1982).

60. *See id.* § 78fff (describing Securities Investor Protection Corporation liquidation proceeding). The Securities Investor Protection Corporation (SIPC) is a nonprofit corporation comprised of most brokers and dealers of securities. *See id.* § 78ccc(a)(2)(A) (describing membership of SIPC). The SIPC functions primarily to protect customers of failing brokerage houses against the individual hardship that those customers would suffer in the absence of a process to pay valid customer claims. *See* Exchange Nat. Bank of Chicago v. Wyatt, 517 F.2d 453, 458 n.11 (2d Cir. 1975). The SIPC liquidation procedure, therefore, is the special procedure through which distribution of valid claims is made. *See* 15 U.S.C. § 78fff-3 to 78fff-4 (1982) (methods for ensuring payment to investors of failing brokerage houses).

61. *See* 15 U.S.C. § 78jjj(b) (1982) (SEC may issue administrative bar against officer of broker-dealer in liquidation proceedings). Under § 78jjj(b), the SEC may bar any corporate officer of a broker-dealer involved in SIPC liquidation from becoming associated with another broker dealer, as long as the SEC finds the bar to be in the public interest. *Id.*

62. *See* '34 Act, § 15(b)(4), 15 U.S.C. §78(o)(b)(4) (1982) (administrative bar may be proper in any of five circumstances).

63. *Id.* § 15(b)(4)(A).

64. *Id.* § 15(b)(4)(B).

65. *Id.* § 15(b)(4)(C).

66. *See* Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1982). The primary purpose of the Securities Act of 1933 ('33 Act) is to ensure that potential investors in securities are given full disclosure of material information regarding public offerings. *See* Touche Ross & Co. v. SEC, 609 F.2d 570, 580 (2d Cir. 1979) (citing *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 195 (1976)).

67. Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1 to 80b-21 (1982). The general purpose of the Investment Advisers Act is to protect members of the investing public who rely on investment advisers against malpractice by advisers. *See* Abrahamson v. Fleschner, 568 F.2d 862, 873 (2d Cir. 1977), *cert. denied,* 436 U.S. 905 (1978) (Investment Advisers Act protects investors who suffer because of advisers' malpractice).

68. Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 to 80a-64 (1982). The Investment Company Act primarily imposes restrictions on the internal management of investment companies. *See* Burks v. Lasker, 441 U.S. 471, 478 (1979) (Investment Company Act functions to restrict internal management of investment companies) (quoting *United States v. National Ass'n of Sec. Dealers,* 422 U.S. 694, 705 n.13 (1975)).

69. *See* Agricultural Commodities Exchange Act, 15 U.S.C. § 713a-7 (1982).

70. '34 Act., § 15(b)(4)(D), 15 U.S.C. § 78(o)(b)(4)(D) (1982).

the SEC may bar an individual who wilfully aided and abetted the violation of any of the above acts.[71]

In addition to barring individuals from association with broker-dealers, the SEC also may bar from association with municipal securities dealers persons who have violated the federal securities laws.[72] The Investment Advisers Act grants the SEC specific power to bar any individual who has violated the securities laws from association with an investment adviser.[73] The Investment Company Act authorizes the SEC to prohibit, by administrative order, any person from serving as an officer or director of an investment company if that person has made or caused to be made any false or misleading registration statement, application or report filed with the SEC.[74] The Investment Company Act also authorizes the SEC to bar from corporate office any individual who has violated or aided and abetted a violation of the federal securities laws.[75]

The above provisions of the federal securities laws demonstrate Congress' intent to make the remedy of administrative bars from corporate office available in limited situations, rather than available as a general administrative remedy. Congress specifically authorized the SEC to bar individuals from the corporate offices of investment companies, advisers and brokers and dealers of securities.[76] Congress, however, never specifically authorized the SEC to administratively bar persons who have violated the securities laws from holding corporate offices or serving on the boards of directors of publicly held corporations.[77] The statutory scheme of the federal securities laws, therefore, does not support the assertion that the SEC may bar individual violators of the '34 Act from holding offices of ordinary publicly held corporations.[78]

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71. *Id.* § 15(b)(4)(E).

72. *See id.* § 15(B)(c)(4). The SEC may bar from association persons seeking to become associated with municipal securities dealers. *Id.* Section 15(B)(c)(4) grants the SEC authority to prevent such an association if the individual seeking to associate with the municipal securities dealer wilfully has committed or aided and abetted the commission of a federal securities law violation. *Id.*

73. *See* Investment Advisers Act, § 203(e), (f), 15 U.S.C. § 80b-3(c), (f) (1982) (SEC may bar individual from associating with investment advisers when individual has violated filing, registration or other requirements of Investment Advisers Act or has been convicted of certain crimes).

74. *See* Investment Company Act, § 9(b)(1), 15 U.S.C. § 80a-9(b)(1)(1982) (SEC may bar individual from associating with investment company if individual made or caused to be made false or misleading registration or filing).

75. *Id.* § 9(b)(2), (3), 15 U.S.C. § 80a-(9)(b)(2), (3) (1982).

76. *See supra* notes 59-75 and accompanying text (discussing statutorily authorized bars under federal securities laws).

77. *See* SEC General Counsel, *supra* note 17, at 9 (no explicit statutory authority exists for SEC to bar individual from serving in corporate office of conventional publicly held corporation). The SEC General Counsel suggests that the SEC may seek explicit statutory authority to issue such administrative bars rather than attempt to utilize the authority that the General Counsel concludes the § 15(c)(4) amendment has created. *Id.* at 19.

78. *See supra* notes 56-77 and accompanying text (existing federal securities laws do not support General Counsel's assertion of administrative bar authority under § 15(c)(4)).

Moreover, the policy considerations behind the '34 Act suggest that an assumption of power by the SEC in declaring administrative bars from corporate offices or boards against individuals who violate or cause a violation of the federal securities laws is unwarranted.[79] The purpose of the '34 Act with regard to general issuers of securities is to compel the issuer to make full disclosure of facts from which investors and potential investors are able to make informed investment decisions and exercise their rights intelligently and effectively.[80] By requiring the management of a general issuer of registered securities to reveal the extent of its interest in the corporation and the management policies it intends to pursue, the drafters of the '34 Act hoped to ensure fair corporate suffrage among the shareholders of the corporation.[81] The belief that flowed from the notion of fair corporate

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79. *See infra* notes 80-88 and accompanying text (policy behind '34 Act is to regulate securities markets without excessive interference in corporate management).

80. *See* Sommer, *The Impact of the SEC on Corporate Governance,* 41 LAW & CONTEMP. PROBS. 115, 118 (1977) (thrust of '33 Act is to compel issuers to make full disclosure). Sommer, a former commissioner of the SEC, described the '34 Act as a variety of restrictions on the conduct of insiders and trading markets, requirements of continuous disclosure, and regulation of the proxy-soliciting process that exchange-listed corporations used. *Id.* Sommer asserted that, in enacting both the '34 Act and the '33 Act, Congress apparently repudiated the use of disclosure as a means of regulating corporations' conduct. *Id.* As Sommer noted, however, the drafters held at least some hope that the disclosure requirements might deter some insiders from trading on the basis of inside information and committing other breaches of fiduciary obligations. *See* H.R. REP. No. 1388, 73d Cong., 2d Sess. 13 (1934) (House Committee hoped that disclosure provisions of '34 Act would bring insider trading into disrepute and encourage maintenance of appropriate fiduciary standards by individuals who control corporations). Sommer also noted that Justice Louis Brandeis' famous statement, "Sunlight is said to be the best of disinfectants; the electric light the most efficient policeman," which supports the idea of disclosure acting to modify corporate conduct, was an underlying theme in the drafting of the legislation. Sommer, *supra,* at 119 & n.22 (citing L. BRANDEIS, OTHER PEOPLE'S MONEY 62 (Harper Torchbook ed. 1967). *See also* Anderson, *The Disclosure Process in Federal Securities Regulation: A Brief Review,* 25 HASTINGS L.Q. 311, 318 (1974) ('33 Act and '34 Act's use of disclosure to police securities industry reflected Brandeis' influence on President Roosevelt and drafters of the acts). Professor Dent has a slightly differing view of the intent of the drafters of the '34 Act than does Sommer. *See* Dent, *supra* note 25, at 903-04. Professor Dent notes that the '34 Act created substantive regulation of the internal affairs of certain segments of the securities industry. *Id.* at 901. The '34 Act authorized the SEC to regulate extensively the functions, operations and activities of national stock exchanges, registered securities associations and broker dealers. *Id.* at 901 n.164. *See, e.g.,* 15 U.S.C. §§ 78o(b)(4), (6), 78s(h) (1982) (SEC has authority to sanction and regulate broker-dealers, individuals associated with broker-dealers and self-regulatory agencies). Outside of the securities industry, Congress attempted to handle the major problems associated with misrepresentation in the sale of securities and abuse of the proxy mechanism through full disclosure. Dent, *supra* note 25, at 903-04. Dent asserts that Congress, by requiring full disclosure, intended to affect corporate governance indirectly instead of by implementing a system of direct federal regulation of corporate managements. *Id.* at 903-04 (citing preamble to '33 Act).

81. *See* Dent, *supra* note 25, at 904 (Congress intended full disclosure requirement regarding proxy solicitation to promote fair corporate suffrage); *id.* at 904 n.180 (citing Disclosure Policy Study (Wheat Report) 10 (1969)) (drafters of '33 Act and '34 Act perceived federal government's role in investment matters as ensuring primarily that investors and

suffrage or "corporate democracy"[82] was that investors, armed with knowledge regarding corporate issues and the right to participate meaningfully in the decision-making process, might mold corporate conduct to a responsible form.[83] Congress' affirmation of the use of a system of disclosure to bring about responsible corporate conduct, therefore, weighs against the propriety of using bars to banish individuals from corporate offices and boards.[84]

Another factor that is as important in determining the appropriateness of bar remedies as Congress' endorsement of a disclosure scheme to modify corporate conduct is Congress' explicit rejection of the idea that the '34 Act granted the government authority to interfere in the internal governance of corporations.[85] Despite the strong urgings of some persons, the drafters of the '34 Act rejected the call for federal legislation that would authorize the government to regulate both the organization and management of corporations.[86] Much of Congress' hesitancy in enacting broad regulatory provisions

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speculators have access to information sufficient to allow them to make rational investment decisions). When considering both the '33 Act and the '34 Act, Congress recognized the importance of ensuring that investors were well informed. *See* H.R. REP. No. 1883, 73d Cong. 2d Sess. 13 (1934) (right of fair corporate suffrage should attach to every equity security); S. REP. No. 47, Cong., 1st Sess. 1 (1933) (basic policy of '33 Act is to provide investor with facts concerning securities that issuer offers).

82. Sommer, *supra* note 66, at 119 & n.24.

83. *Id.* at 119. Sommer asserts that faith in the "corporate democracy" idea led Congress to grant the SEC very broad power to regulate proxy solicitations. *Id.*

84. *See supra* notes 80-83 and accompanying text (discussing Congress' endorsement of disclosure system to indirectly mold corporate conduct).

85. *See infra* notes 86-88 and accompanying text (discussing Congress' explicit rejection of scheme authorizing general federal control of corporate organization and management).

86. Sommer, *supra* note 80, at 118 (Congress ignored "sorry record" played at hearing and declined to authorize federal interference in corporate organization or governance). Some of the most vocal opponents of both the '33 Act and the '34 Act as proposed were those critics who called for legislation requiring federal chartering of corporations. *See* Dent, *supra* note 25, at 908 & n.194 (witness before House and Senate committees considering '33 Act and '34 Act who claimed that disclosure was ineffective and that federal incorporation law was necessary). The witnesses who called for federal incorporation included the president of the New York Stock Exchange and the chairman of the Exchange's Stock List Committee. *Id.* at 908 n.194. Congress, however, rejected the calls for federal incorporation, as it had done since the 1880's. *Id.* at 907. The '33 Act and '34 Act's rejection of federal incorporation law suggests that Congress was anxious to avoid direct regulation of corporate management. *Id.* Congress' refusal to enact a federal incorporation statute prompted a new round of commentary advocating federal incorporation. *See id.* at 908 (advocation of federal incorporation law continued after 1934). *See generally* Berlack, *Federal Incorporation and Securities Regulation,* 49 HARV. L. REV. 396 (1936) (concluding that federal incorporation law might create dangers greater than those which such legislation would attempt to prevent); *Federal Legislation—The Federal Incorporation Licensing Bill: Corporate Regulation,* 27 GEO. L.J. 1092 (1939) (supporting proposed legislation requiring most corporations carrying on interstate business to obtain federal licenses); Jennings, *Federal Incorporation of Licensing of Interstate Corporate Business,* 23 MINN. L. REV. 710 (1939) (federal incorporation law would be preferable to proposed federal licensing bill); Ruschlein, *Federalization—Design for Corporate Reform in a National Economy,* 91 U. PA. L. REV. 91 (1942) (advocating federal incorporation legislation); Watkins, *Federalization of Corporations,* 13 TENN. L. REV. 89 (1935) (discussing likelihood of future federal incorporation statute).

may have stemmed from the legislature's awareness that, traditionally, regulation of the organization and internal management of corporations has been a function of the states.[87] The '34 Act, however, was not an attempt to wrest that power from the states and place it with the federal government.[88] The policy underlying the '34 Act, therefore, is to regulate most corporations indirectly.[89] The '34 Act seeks to enable investors and potential investors to make fully informed, rational choices regarding investment strategies and corporate decisions.[90] By enabling individuals to make fully informed decisions, the '34 Act encourages greater responsibility in corporate behavior.[91] The legislative history of the '34 Act demonstrates the drafters' intent to prohibit the SEC from interfering in corporate management.[92] The SEC General Counsel's conclusion that the ITSA amendment to section 15(c)(4) authorizes the SEC to issue administrative bars, however, clearly would authorize the SEC to interfere with corporate goverance in a fundamental way.[93] The General Counsel's interpretation of section 15(c)(4) under the ITSA, therefore, is inconsistent with the policies underlying the '34 Act.

In enacting the ITSA, Congress amended the federal securities laws in an effort to give the SEC greater enforcement powers in dealing with insider trading.[94] Additionally, Congress extended the coverge of administrative compliance proceedings under section 15(c)(4) of the '34 Act to include proxy and tender offer violations.[95] Also, the ITSA amendment to section 15(c)(4)

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87. *See* Dent, *supra* note 25, at 907 (Congress' explicit retention of expansive state role in corporate governance demonstrates congressional intent to eschew direct regulation of corporate management). The '34 Act contains a provision that specifically maintains the jurisdiction of state securities commissions. 15 U.S.C. § 78bb(a) (1982). *See* Dent, *supra* note 25, at 907 ('33 Act and '34 Act preserve jurisdiction of state securities commissions); Sommer, *supra* note 80, at 116 (regulation of internal corporate governance of corporations historically is function of individual states).

88. *See* S. REP. No. 792, 73d Cong., 2d Sess. 10 (1934) ('34 Act is not disguised attempt to vest federal government with authority to interfere in corporate management). The original Senate proposal of the '34 Act actually proscribed the SEC from interfering with the management of an issuer. *See id.* at 20. The conference committee deleted this section from the final bill believing the section to be unnecessary, because the committee did not believe the '34 Act was open to misconstruction regarding SEC interference in corporate management. *See* H.R. REP. No. 1838, 73d Cong., 2d Sess. 35 (1934) (§ 13(d) of original Senate bill deleted from final version of '34 Act).

89. *See supra* notes 80-88 and accompanying text (discussing process of corporate regulation that drafters of '34 Act intended).

90. *See supra* notes 80-81 (describing process of fair corporate suffrage).

91. *See supra* text accompanying note 83 (belief that fair corporate suffrage will mold corporate behavior).

92. *See supra* notes 80-88 and accompanying text (drafters of '34 Act did not intend SEC to interfere directly in corporate management).

93. *See supra* note 17 and accompanying text (SEC General Counsel's assertion that § 15(c)(4) amendment permits SEC to administratively bar from corporate boards and offices persons who violate certain provisions of '34 Act).

94. *See supra* note 3 and accompanying text (drafters intended ITSA to assist SEC in campaign against insider trading).

95. *See supra* note 29 and accompanying text (amendment to § 15(c)(4) authorizes administrative action for violations of § 14 of '34 Act).

subjects persons who directly or indirectly cause a failure of compliance with the securities laws to SEC compliance orders.[96]

Insufficient support, however, exists for the contention that the ITSA amendment to section 15(c)(4) empowers the SEC to bar individuals who violate or cause a violation of the securities laws from corporate offices and boards.[97] The legislative history of the ITSA reveals that Congress did not intend that the ITSA have any such effect.[98] Furthermore, had Congress intended such an administrative bar to be available to the SEC, Congress would have provided specifically for such a bar, as it has in a number of other areas in the federal securities laws.[99] Finally, an administrative bar against individuals who govern or seek to govern ordinary publicly held corporations is inconsistent with the full disclosure philosophy of the '34 Act.[100] Although Congress, in adopting the '34 Act, sought to minimize direct interference with corporate governance and to affect corporate governance indirectly by ensuring fair corporate suffrage thorugh full disclosure, the SEC General Counsel's proposed remedy attempts to regulate corporate behavior through direct interference in corporate governance. The Insider Trading Sanctions Act amendments to section 15(c)(4) of the '34 Act, therefore, should not be construed as authorizing the SEC to administratively bar from corporate offices or boards individuals whom the SEC finds have violated federal securities laws.

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96. *See supra* note 47 and accompanying text (amendment to § 15(c)(4) authorizes SEC to take administrative action against persons ultimately responsible for securities violations).

97. *See* SEC General Counsel, *supra* note 17, at 19 (amendment to § 15(c)(4) coupled with § 15(c)(4)'s broad language authorizes SEC to issue administrative bars from corporate offices or directorships of conventional, publicly held corporations against individuals).

98. *See supra* notes 28-48 and accompanying text (discussing legislative history of ITSA).

99. *See supra* notes 55-76 and accompanying text (discussing statutory securities law provisions providing for administrative bar of individuals who violate specific securities laws).

100. *See supra* notes 79-88 and accompanying text (discussing philosophy underlying federal securities regulation).