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Introduction

The Securities and Exchange Commission (SEC) enjoys a reputation envied by many other regulatory bodies for its ability to shape developments in the area of its expertise—the federal securities laws. While the SEC traditionally viewed the securities statutes as remedial, recent developments make it clear that the SEC now considers them, as amended, to be penal in nature. As a consequence, many commentators question whether Congress and the courts should continue to afford the SEC the same deference as in the past to interpret the federal securities laws.

The primary vehicle used by the SEC to enunciate its views on the law and certain policy matters has been through the initiation of enforcement cases, the vast majority of which settle prior to adjudication. Because the statutes for which the SEC is responsible have become increasingly penal, this Article questions whether the SEC should continue to have as much latitude as it was afforded in the past to influence the development of federal securities laws. To ensure the SEC's continued vitality and to protect persons subject to its authority from the potential for overreaching, this Article proposes that the SEC consider alternatives to the settlement process as a means for establishing broad rules of conduct. More specifically, the SEC should establish broad rules of conduct concerning the responsibility of senior managers to supervise their employees. The SEC's current position is that senior managers should be personally subject to substantial penalties, including monetary fines, suspensions, or bars from

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the securities business altogether, if these managers fail to ensure that the institutions with which they are associated and individual employees who report to them comply with applicable law.

Discussion

For sixty years, the SEC has been considered one of the premier federal regulatory agencies and to some, the crown jewel of New Deal legislation. The SEC has exhibited a remarkable ability to interpret the federal securities laws and to adopt and apply its own rules in a manner that has fostered investor confidence in the securities markets. The SEC also has found a way to adapt that regulatory framework so that it can be applied effectively to the rapidly changing investment community that it regulates. Since 1934, when Congress created the SEC, dramatic changes have taken place in the capital formation process, the development of global markets, the creation and proliferation of non-equity and unconventional securities (such as derivatives), and the shift of investment assets from individual ownership to institutional control in the form of pension plans and mutual funds. At each turn, the SEC has devised ways to apply its existing powers to the new problems that surfaced as a result of those developments. Although the SEC has occasionally sought legislative change, it has relied upon existing law in a majority of cases to craft solutions to these new problems.

The SEC has been instrumental in the development of the federal securities laws as an advocate in the courts and before Congress, as well as through its own rule-making process. However, the SEC has functioned as law-maker in a rather unique way—through the use of its enforcement program. The SEC can initiate actions against regulated and unregulated persons either in federal court or in an administrative proceeding presided over by an administrative law judge whose decisions are subject to review by the SEC itself.[1] These enforcement actions provide numerous opportunities for the SEC to affect the development of the federal securities laws.

For years, the SEC has settled the vast majority of cases that it has brought against both regulated and unregulated persons.[2] While to some

1. *See, e.g.*, Securities Exchange Act of 1934, Pub. L. No. 73-291, §§ 15, 21, 48 Stat. 881, 895-96, 899-901 (codified as amended at 15 U.S.C. §§ 78o, 78u (1988 & Supp. IV 1992)) [hereinafter Exchange Act].

2. *See generally* TASK FORCE ON ADMINISTRATIVE PROCEEDINGS, U.S. SECURITIES AND EXCHANGE COMMISSION, FAIR AND EFFICIENT ADMINISTRATIVE PROCEEDINGS,

extent the SEC and the persons subject to the action negotiate the content of these settlements, the SEC regularly uses such actions to confirm—and in many cases announce—its expectations regarding the conduct of large segments of the investment community. By selecting which cases to bring and what language to use, as well as by fashioning remedies that require future action, the SEC regularly uses the settlement process to shape how courts will interpret the law and how securities professionals will adhere to it.[3]

Through the settlement process, the SEC has developed the law in many areas with relatively modest resources. The agency's reliance on the settlement process to reform the law, however, is flawed in one important respect. Because the SEC is both a party and an adjudicator in settled cases, its judgment about the proper result in any case is influenced by its role as advocate. In the case of a contested action in court, for example, a neutral judge's experience and impartiality may serve to modify an advocate's more extreme position on what the law ought to be. While a court would likely dismiss a case with weak evidence regardless of its importance, the SEC may treat evidentiary issues with greater latitude because it has a strong commitment to the principles involved in a given case.

An inherent conflict may also arise when the SEC uses an enforcement case to legislate changes in the law. Congress, when enacting or amending the law, evaluates the long-term effect of a particular measure and tempers the final result accordingly, given its responsibility to constituents and the availability of debate prior to enactment of legislation. Similarly, when the SEC uses its rulemaking process to adopt or change rules concerning compliance with the federal securities laws, the proposed rule is subject to notice and comment, thereby ensuring that interested persons have an opportunity to influence the SEC's decision.[4]

REPORT OF THE TASK FORCE ON ADMINISTRATIVE PROCEEDINGS OF THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION 13 (1993).

3. *See* Committee on Federal Regulation of Securities, *Report of the Task Force on SEC Settlements*, 47 BUS. LAW. 1083, 1140-49 (1992).

4. *Id.* at 1142-44; Letter from Section of Business Law and Section of Administrative Law and Regulatory Practice, American Bar Association to Jonathan G. Katz, Esq., Secretary, Securities and Exchange Commission and Paul Gonson, Esq., acting General Counsel Chair, ADR Task Force, Securities and Exchange Commission (Sept. 27, 1993) (on file with author).

By contrast, the SEC issues settlement orders without any opportunity for debate by interested third-parties. Typically, the SEC presents respondents with draft orders and settlement conditions that are nonnegotiable. If a respondent elects not to settle, the SEC initiates an action almost immediately and seeks penalties even greater than those offered in the settlement. As a practical matter, respondents confront a Hobbesian choice: to accept whatever severe penalties are being imposed to conclude the matter or to face the uncertainty and expense that will result from a decision to resist. Consequently, the SEC has tremendous leverage in fashioning the final outcome of the case. Interested persons such as industry representatives play no role in shaping the content of an individual settled order even though that order establishes how the SEC expects persons similarly situated to the respondents to conduct themselves in the future.

For many years, the SEC's use of its enforcement powers in the foregoing manner has been accepted as another example of the remedial, but flexible, approach approved by the courts in interpreting the federal securities laws. Indeed, as remedial statutes, federal courts gave a broad and flexible reading to the Exchange Act and other federal securities laws. In recent years, however, federal courts have looked with less favor on the continued extension of the Exchange Act's provisions.[5]

The enactment of the Securities Enforcement Remedies and Penny Stock Reform Act of 1990 (Remedies Act), which amended certain provisions of the Exchange Act, provided courts with reasons to begin contracting the SEC's powers.[6] The Remedies Act authorizes the SEC to assess civil monetary penalties in administrative proceedings instituted against registered securities dealers and their associated persons.[7] The

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5. *Compare* SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963) *with* Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 114 S. Ct. 1439, 1447-48 (1994).

6. Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, § 202(a), 104 Stat. 931, 937-38 (codified at 15 U.S.C. § 78u-2 (Supp. IV 1992)) [hereinafter Remedies Act].

7. Section 21B(a) of the Exchange Act provides as follows:

> In any proceeding instituted pursuant to sections 78o(b)(4), 78o(b)(6), 78o-4, 78o-5, or 78q-1 of this title against any person, the [SEC] or the appropriate regulatory agency may impose a civil penalty if it finds, on the record after notice and opportunity for hearing, that such person—

SEC has employed the Remedies Act to extract significant penalties from defendants in most cases.

A three-tier system set forth in section 21B(b) of the Exchange Act sets forth the maximum penalty that the SEC may assess.[8] The second tier, which includes violations involving fraud, provides for higher maximum penalties than the first tier. The Exchange Act provides for even higher maximum penalties for third tier violations, which involve fraud that results in substantial losses, creates the risk of substantial losses to other persons, or results in substantial pecuniary gain to the respondent.

Following hearings on the Remedies Act, the Senate and House Reports both recommended enactment of the civil monetary penalty provisions. Both Reports stated that civil monetary penalties would give the SEC flexibility to tailor remedies to the facts and circumstances of each violation. Both Reports also note that giving the SEC the power to impose civil money penalties would increase deterrence and would help maintain public confidence in the integrity of the markets.[9]

> (1) has willfully violated any provision of the Securities Act of 1933, the Investment Company Act of 1940, the Investment Advisers Act of 1940, or this chapter, or the rules or regulations thereunder, or the rules of the Municipal Securities Rulemaking Board;
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> (2) has willfully aided, abetted, counseled, commanded, induced, or procured such a violation by any other person;
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> (3) has willfully made or caused to be made in any application for registration or report required to be filed with the [SEC] or with any other appropriate regulatory agency under this title, or in any proceeding before the [SEC] with respect to registration, any statement which was, at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any such application or report any material fact which is required to be stated therein; or
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> (4) has failed reasonably to supervise, within the meaning of section 78o(b)(4)(E) of this title, with a view to preventing violations of the provisions of such statutes, rules and regulations, another person who commits such a violation, if such other person is subject to his supervision;
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> and that such penalty is in the public interest.

15 U.S.C. § 78u-2(a) (Supp. IV 1992).

8. *Id.* § 78u-2(b).

9. H.R. REP. NO. 616, 101st Cong., 2d Sess. 17 (1990); S. REP. NO. 337, 101st Cong., 2d Sess. 9-10 (1990).

Also, under section 21C of the Exchange Act, the SEC now has the authority to issue permanent cease and desist orders:

> requiring such person, any other person that is, was, or would be a cause of the violation, due to an act or omission the person knew or should have known would contribute to such violation, to cease and desist from committing or causing such violation and any future violation of the same provision, rule or regulation. Such order may, in addition to requiring a person to cease and desist from committing or causing a violation, require such person to comply, or to take steps to effect compliance, with such provision, rule, or regulation, upon such terms and conditions and within such time as the [SEC] may specify in such order. . . .[10]

The Exchange Act, as amended, includes strong sanctions for violations of cease and desist orders. If the SEC believes an order has been violated, the SEC may bring an action in federal district court under section 21(d)(3)(A) of the Exchange Act and may seek a civil money penalty.[11] The district court would then determine the amount of the penalty "in light of the facts and circumstances" under a three-tier structure similar to that found in section 21B(b).[12] Essentially, Congress designed this structure to provide greater penalties for violations involving fraud in which other persons suffer substantial loss or the risk of substantial loss. Hence, penalties range from \$5,000 to \$100,000 for individuals and from \$50,000 to \$500,000 for firms or "the gross amount of pecuniary gain to such a defendant as a result of the violation," whichever is greater.[13] The violator is subject to multiple, even daily, money penalties because section 21(d)(3)(D) provides that each separate violation of the cease and desist order is a separate offense and each day of a continuing failure to comply is a separate offense.

The question posed by this Article is whether, given the SEC's decision to interpret the federal securities laws as penal, it remains appropriate for the SEC to rely so heavily on the settlement process as the primary means of developing the federal securities law? This author suggests that a modification of that practice is in order. Given the current

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10. 15 U.S.C. § 78u-3 (Supp. IV 1992).

11. *Id.* § 78u(d)(3).

12. *Compare* 15 U.S.C. § 78u(d)(3) (Supp. IV 1992) *with* 15 U.S.C. § 78u-2(b) (Supp. IV 1992).

13. *Id.* § 78u(d)(3)(B)(i), (iii).

SEC philosophy that misconduct must be punished severely and that the Exchange Act, as amended by the Remedies Act, is no longer remedial,[14] the SEC should expose its contemplated interpretation of a statute for comment or review prior to adopting new rules of conduct that prospectively affect broad segments of the investment community. An effective way for the SEC to disseminate its interpretation of the law is to issue reports of investigations or interpretive releases that do not impose severe sanctions on individual respondents. In appropriate circumstances, the SEC should continue to use its enforcement powers to punish individual wrongdoers, but it should refuse to use such cases to overturn or radically depart from existing law, particularly at the expense of an individual respondent.

Prudential Securities, Inc.[15] provides a dramatic example of the SEC's election to break new ground through the settlement process. In *Prudential*, the SEC alleged that the brokerage firm had engaged in improper sales practices concerning the sale of direct investments to customers in the late 1980s. As a condition of the settlement, the SEC ordered Prudential to waive the statute of limitations defense that otherwise existed with regard to many of the transactions that had occurred. Concurrently, Prudential agreed to establish a fund of an unlimited amount (the initial deposit was $300 million) to compensate its customers who elected to use a modified claim procedure.[16]

Although the *Prudential* settlement contains a number of important features that will influence how securities firms conduct themselves in the retail sales area, the waiver of the statute of limitations is also noteworthy. The waiver represented a clear departure from settled law. Indeed, over substantial opposition from the SEC as amicus curiae, the United States Supreme Court in 1991 held that the applicable statute of limitations for private actions invoked under the relevant statutory provision, section 10(b)

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14. *See* Ralph C. Ferrara, *Hardball! The SEC's New Arsenal of Enforcement Weapons*, 47 BUS. LAW. 33 (1991); Anne C. Flannery & Elizabeth A. Corley, *Understanding the SEC's New Powers: Expanded Liability for Individuals and Regulated Entities*, April 5, 1993, A.B.A. Sec. Bus. Law, 1993 Spring Meeting (on file with *Washington and Lee Law Review*).

15. Prudential Sec., Inc., Exchange Act Release No. 33,082, 55 SEC DOCK. 720 (1993).

16. *Id.*

of the Exchange Act, was three years.[17] In that case and others, the Supreme Court has expressed hostility toward such private actions even though conventional wisdom has recognized the existence of such implied actions as a supplement to the SEC's own enforcement of the federal securities laws.[18]

While *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*[19] sparked considerable debate in the legal community, and legislative efforts to override the Court's holding remain alive, it is beyond question that the Court viewed its holding in *Lampf* with respect to the applicable statute of limitations to be quite clear. Indeed, the Court emphasized the same principles—finality and uniformity within the federal system—that Prudential had raised vigorously, and successfully, in private actions brought by investors years after the transactions in question had occurred.[20]

Nevertheless, by issuing an order that Prudential agreed not to contest, the SEC, in one stroke, removed the statute of limitations as an obstacle to investor recovery. In doing so, the SEC accomplished what it had failed to convince either Congress or the Court to do. Although the *Prudential* order is not, by its terms, res judicata in cases involving other securities firms, the reality is that the SEC will confront all similarly situated firms with the terms of the *Prudential* settlement. These firms will face considerable pressure to acquiesce to the SEC's demands. Indeed, the cost of a confrontation with the SEC may compel some firms to agree to waive the statute of limitations in circumstances that are not comparable to those alleged to have occurred in the *Prudential* matter.

Whether the result in *Prudential* from a social or policy-making perspective is just or unjust is irrelevant. Instead, the question is whether, as a matter of jurisprudence, such a major alteration in the law should occur as the result of an order in which the SEC stands as advocate, judge, and rulemaker. Although the *Prudential* order was bilateral in the sense that Prudential negotiated the order's terms with the SEC, the circumstances required Prudential to consider its own parochial interests first and

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17. *See* Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991).

18. *E.g., id.* at 358; Ernst & Ernst v. Hochfelder, 425 U.S. 185, 196 (1976).

19. 501 U.S. 350 (1991).

20. Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 357 (1991).

foremost. A strong argument can be made that by agreeing to such an extraordinary condition, Prudential limited its liability as far as the SEC was concerned, reduced its exposure to punitive damages in actions in which the statute might not be a complete defense, and eliminated an obligation to the fifty state regulators who were clamoring for even greater penalties. Obviously, from the SEC's perspective, the settlement offered equally important benefits—a satisfactory conclusion to an important case that raised troubling questions about the conduct of an important securities firm and a near-windfall to thousands of investors whose financial condition might have prevented them from pursuing their own rights of recovery, even if they could have overcome the statute of limitations problem. The difficulty with such an arrangement is that the SEC did not receive commentary from interested persons until it was too late. Conceivably, persons less affected by the desire to conclude the matter at hand would have raised significant questions about the wisdom of an SEC order requiring waiver of the statute of limitations given the potential precedential effect of such an order in future cases.

The question should be asked, therefore, whether a similar outcome would have resulted had Prudential contested the case. For example, if an independent judge had evaluated the matter after the SEC presented its proof, and if the respondents had rebutted such a record, would the judge have reached the same result? Similarly, had potential claimants whose remedies were affected by the *Prudential* order been given a forum in which to be heard, would the outcome have been different? Had those claimants or their counsel addressed a court after a full evidentiary record had been developed, it is likely that the court's final order, assuming violations were found, would have considered factors not addressed by the SEC in its unilateral order. Indeed, a threshold question exists whether, as a matter of law or policy, a court would agree with the principle underlying the SEC's desire to obtain such a remedy in the first place. In fact, a court may even have concluded that the law concerning the statute of limitations should not be altered, notwithstanding the SEC's policy arguments supporting a change in the law.

In evaluating whether the SEC should be permitted to direct the law through the settlement process, it is appropriate to consider these questions, as well as whether the SEC's position is valid. In fact, courts have not always been receptive to the SEC's view of such policy issues or, in some cases, of the law, particularly when the SEC has attempted to extend the reach of the federal securities laws.

The most recent example of the Supreme Court's refusal to accept the SEC's position on such issues was in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*[21] In *Bank of Denver*, the Supreme Court held that section 10(b) of the Exchange Act cannot be read to sustain a cause of action for damages against persons alleged to have aided and abetted a violation of that provision.[22] The Court's decision flatly rejected the position of the SEC, as amicus curiae. The Court also disagreed with the SEC's contention that the existence of such a cause of action was critical to the SEC's own enforcement program, as well as a necessary supplement to private enforcement of the securities laws.[23]

The holding in *Bank of Denver* overturns substantial lower court precedent and runs counter to hundreds of cases settled by the SEC with persons whom it had found had aided and abetted violations of section 10(b) of the Exchange Act. More importantly, the case illustrates that the SEC, when it functions in the treble role of advocate, rulemaker, and adjudicator, may come to a conclusion far different from that which a court, upon review, might reach. Put simply, the SEC may reach the wrong conclusion, as a matter of law, in circumstances that allow no opportunity or incentive for the SEC's adversaries or third parties to brief the issue before a neutral forum. This overreaching typically occurs when the SEC's pursuit of certain policy objectives has been frustrated by Congress or the courts, such as with respect to the statute of limitations issue.

In the past, concern over the SEC's ability to invoke new principles of law through settled cases was at least tempered by the fact that the sanctions imposed against violators were not substantial. For example, an institution whose deficient compliance procedures in the retail sales area failed to prevent violations by its brokers typically consented to an order directing the firm to review and revise its compliance system.[24] Generally, if middle or senior management was sued at all, the likely sanctions

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21. 114 S. Ct. 1439 (1994).

22. Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 114 S. Ct. 1439, 1446-48 (1994).

23. *Id.* at 1454.

24. *See, e.g.*, Dean Witter Reynolds, Inc., Exchange Act Release No. 26,144, 41 SEC DOCK. 1680 (1988); Thomson McKinnon Sec., Inc., Exchange Act Release No. 20,908, 30 SEC DOCK. 619 (1984).

were merely remedies such as training, enhanced supervision, and brief suspensions from the performance of supervisory functions.[25]

Since the enactment of the Remedies Act, the landscape has changed dramatically. The SEC has made it apparent that institutional misconduct, such as that alleged in *Prudential*, will expose a securities firm not only to the penalties identified above, but to multi-million dollar fines and sweeping internal changes.[26]

In addition, individual managers are now equally at risk. For example, the SEC deemed the former chairman and chief executive officer, former president, and former vice chairman of Salomon Brothers, Inc. responsible for misconduct by the head of the government securities trading desk. They respectively agreed never to serve as chairman or chief executive officer in the securities business, to be suspended for six months from the securities business, and to be suspended for three months from the securities business. In addition, the three men paid fines ranging from $50,000 to $100,000.[27]

More recently, the SEC settled a case against several principals of First Investors Corporation, a firm whose brokers allegedly misled mutual fund investors regarding the safety and return of certain high yield funds.[28] In that case, the SEC alleged supervisory deficiencies by the chairman of the board, the president, the executive vice president, head of sales, and several senior supervisors. The SEC imposed suspensions

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25. *See, e.g.*, Vieira, Exchange Act Release No. 26,579, 42 SEC DOCK. 1815, 1822-23 (1989) (upon Offer of Settlement, branch manager censured and ordered to participate in four weeks of training); Boccella, Exchange Act Release No. 26,574, 42 SEC DOCK. 1808, 1814 (1989) (upon Offer of Settlement, branch office manager censured and ordered to participate in four weeks of training); Smith, Barney Harris & Upham & Co., Exchange Act Release No. 21,813, [1984-85 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,745 (Feb. 19, 1985) (upon Offer of Settlement, branch office manager received 120-day supervisory suspension); Matl, Exchange Act Release No. 22,395, 33 SEC DOCK. 1629, 1633-34 (1985) (upon Offer of Settlement, branch manager received 30-day suspension followed by 30-day supervisory suspension and was required to study registrant's compliance procedures).

26. Prudential Sec., Inc., Exchange Act Release No. 33,082, 55 SEC DOCK. 720, 749-50 (1993) ($10 million fine and creation of Compliance Committee accountable to Board of Directors).

27. *See* Gutfreund, Exchange Act Release No. 31,554, 52 SEC DOCK. 4370, 4394-95 (1992).

28. *See* Grayson, Exchange Act Release No. 33,298, 55 SEC DOCK. 1631 (1993).

ranging from three months (for the chairman) to six months. During their suspensions, these individuals were precluded from working in the securities industry in any capacity.

Whether the shift in policy reflected by these settlements is to be applauded or criticized, it is evident that the SEC has determined that it will hold individuals and their institutions liable in circumstances in which misconduct has occurred. Further, *Prudential* makes it clear that the SEC will insist upon sweeping measures to compensate those who may have been damaged by such misconduct. Finally, the SEC is likely to seek financial and other sanctions against individuals who were in a position to prevent such misconduct.

Under the circumstances, a reassessment of the SEC's use of its settlement process as the vehicle for such change appears timely. Moreover, given the potential for overreaching that exists in the settlement context, this Article's recommendation that the SEC find a different means to articulate new standards of conduct is fair. Obviously, the SEC's enforcement program is somewhat reactive and is certainly fact-driven. One can argue that the SEC must rely upon the cases it finds to address general standards of conduct. Moreover, the SEC presumably would contend that when it concludes on the basis of its investigation that punishable conduct has occurred, it is not in the public interest to solicit public comment or judicial review if the affected parties are inclined to resolve the matter, even if it is at a price far greater than that extracted in the past. However, affected persons are least likely to have the incentive to contest a legal principle when the cost of a defense is so high. In fact, costly litigation and potentially crippling sanctions act as disincentives to challenging the SEC's position.

As evidenced by the outcome in *Bank of Denver*, SEC policy may differ from the courts' interpretation of the law. Thus, the SEC should consider separating its policy-making functions from its judicial functions. Assuming that this idea has merit, the SEC should find alternatives to the settlement process for the purpose of articulating what behavior it expects from those it is empowered to prosecute. While the SEC may properly use the settlement process to influence the development of the law, it should refrain from doing so in cases in which it is clearly breaking new ground. If the SEC does choose to use its settlement powers to establish broad principles, however, it should not do so at the expense of a particular individual. In other words, the SEC should not extract huge penalties to make a point in cases in which it elects to alter radically federal securities law.

If the SEC were willing to explore alternatives to the settlement process, what other vehicles could it use? First, the SEC could issue interpretative releases or reports about its investigations without taking further punitive measures. While the use of these releases remains a rare occurrence, the SEC employed such a device in *Gutfreund*,[29] in which the SEC discussed the manner in which it expected an institution's chief legal officer to behave. In *Gutfreund*, the SEC refrained from initiating an enforcement action against Donald Feuerstein, the chief legal officer, but described at great length what it found his role and shortcomings to be. This approach gave interested persons notice of what steps the SEC expected such persons to take in the future when confronted with similar wrongdoing.[30]

Second, the SEC could resume issuing remedial orders against individuals for widespread misconduct. When the SEC first issues an order that identifies a new problem, the SEC should not impose severe monetary or other penal sanctions. Instead, the SEC should use orders concerning new problems to articulate its views as to appropriate standards of conduct without unduly penalizing the individuals whose activities have caught the SEC's attention. From Mr. Feuerstein's perspective, a public report that merely described his alleged deficiencies presumably was preferable to an SEC order in which he was named as a respondent, however mild or remedial the sanctions.

A third alternative, which avoids disclosing any individual's identity, would be the issuance of an interpretive release that identifies SEC concerns or reviews certain industry practices. A release or an investigative report could describe deficiencies and the need for reform without holding particular firms or individuals accountable for having committed misconduct. An example of the SEC's ability to release such a report, which in turn can effect industry standards, is an SEC report issued in 1993 concerning trading practices in the high yield securities area.[31] While issuance of a release would not result in the imposition of sanctions

29. *See Gutfreund*, 52 SEC DOCK. at 4394-95.

30. *Id.*

31. *See generally* DIVISION OF MKT. REGULATION, U.S. SEC. AND EXCH. COMM'N, BROKER-DEALER INTERNAL CONTROL PROCEDURES FOR HIGH YIELD SECURITIES (1993).

of any kind against particular persons, the release could educate the industry as to what the SEC expects in a given area not previously the subject of enforcement actions. Were the SEC to discover misconduct in that area following dissemination of such a report, its decision to institute an enforcement action and to impose severe penalties against individual wrongdoers would be subject to little criticism. If the SEC were to pursue such a bifurcated approach, it could fulfill both its remedial and penal objectives without unfairly punishing individuals who may not have been on full notice of the SEC's expectations.

Conclusion

Although the SEC need not resort to other alternatives, particularly given potential respondents' willingness to consent to settlements that describe at length the SEC's views on broad matters of law and policy, the SEC's use of these alternatives would enhance the agency's position as a responsible regulator and prosecutor. This Article merely suggests that the SEC at least should consider other vehicles to ensure that the agency retains its preeminent position as an innovative law enforcement agency. In addition, the SEC may find a greater willingness among the investment community to cooperate in the fact-finding process and to resolve matters quickly if alternatives to those presently offered exist. At a minimum, the SEC can avoid finding itself in the embarrassing position that resulted from the Supreme Court's *Bank of Denver* opinion, which struck down policy that the SEC had followed for years.