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Comments of the American Institute of Certified Public Accountants Concerning the Proposal to Amend Rule 2(e)(7) of the Commission's Rules of Practice (SEC File No. S7-520)

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To Members of the Board of Directors
Members of the Relations with the SEC Subcommittee
Managing Partners of Firms Having a Substantial SEC Practice
Chairmen of Auditing and Accounting Divisions
Staff Vice Presidents and Division Directors

Enclosed for your information is a copy of the Institute's response to the request of the SEC for comment on the proposal to amend Rule 2(e)(7) to substitute public disciplinary proceedings for non-public proceedings, which has been filed with the Commission.

The response has been drafted by a special committee chaired by Ray Groves, and with the assistance of the Institute's legal counsel.

Yours very truly,

W. E. Olson
President

WEO:Ss

Enclosure

June 13, 1974

COMMENTS OF THE
AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS
CONCERNING THE PROPOSAL TO AMEND RULE 2(e)(7)
OF THE COMMISSION'S RULES OF PRACTICE
(SEC FILE NO. S7-520)

The American Institute of Certified Public Accountants respectfully submits these comments on the above subject in response to the invitation extended by S.A. Release No. 5477. The Institute is the foremost national representative of the public accounting profession, whose members, along with those of the legal profession, would be principally affected by the proposed change in Rule 2(e)(7) of the Commission's Rules of Practice.

The Institute's position, in brief, is that the proposal to amend Rule 2(e)(7) to substitute public disciplinary proceedings for non-public proceedings should not be adopted. No substantial consideration of public policy supports such a reversal of present Rule 2(e)(7); and very serious considerations, both of principle and of a practical nature, weigh against it. In the light of the concentrated consideration of the subject stimulated by the proposal we do suggest, however, that other changes might usefully be made in Rule 2(e)(7): specifically, we suggest that the Rule be amended (1) to make clear that all stages of a proceeding short of

a final adverse determination are non-public; and (2) to specify that exceptions will be made in particular proceedings if, but only if, all respondents so request.

I

THE NATURE AND SCOPE OF THE PROPOSED CHANGES IN RULE 2(e)(7)

The changes in Rule 2(e)(7) proposed by the Release are two: the addition of a prefatory phrase extending the application of the Rule to "all proceedings," and not just to hearings; and a diametric change of the Rule's operative term, "non-public," to "public." These changes would indeed, as the Release states, constitute a "reversal" of the Rule, and of the unvarying practice with regard to Rule 2(e) proceedings since the Rule was first promulgated.

Although proceedings brought under present Rule 2(e) are only presumptively private, since the Commission may on its own motion or on request of a party direct otherwise, we understand that in fact no such proceeding has ever been public. As it presently stands, Rule 2(e)(7) specified only that "hearings" shall be non-public; but the practice quite properly has been to treat as non-public the issuance of the Order for Proceeding as well as all subsequent stages, including appeal to the Commission, prior to a final determination. The practice has also been to treat as non-public the final determination

in any proceeding where it was favorable to the respondent.*/

Presumably the usual if not uniform practice under the proposed Rule would be to make public all aspects of Rule 2(e) proceedings, from start to finish. The Commission would still be empowered to make exception to the usual practice in particular cases, either on its own motion or that of a respondent, but it is presumably contemplated that requests for non-public treatment (which of course could be expected in virtually every case) would normally be denied. There would be no indication in the Rule, and there is none in the Release, of the criteria the Commission would refer to in deciding to make a matter non-public.

The change from non-public to public would as a practical matter affect only those Rule 2(e) proceedings where the Commission makes its own original determination of fault on the part of the professional. It would not significantly affect the practice in derivative proceedings, where the im-

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*/ The Commission has on occasion published a description of the facts found in a Rule 2(e) proceeding where the charges were ultimately dismissed -- but without identifying the respondent involved. See, e.g., A.S.R. No. 77, February 19, 1954. There have also been some instances where the Commission announced the dismissal of a 2(e) proceeding and identified the professional involved, but this has occurred only in instances where the factual determinations were adverse to the respondent and the dismissal rested upon a judgment that no 2(e) sanction was called for. See, e.g., In the Matter of Barrow, Wade, Guthrie & Co., A.S.R. No. 67, April 18, 1949.

position of a Rule 2(e) sanction results from a determination of fault by another tribunal.

In derivative proceedings -- that is, those based on disbarment by other authorities, conviction of a crime, or an injunction or adverse finding in a civil action brought by the Commission -- the first action taken by the Commission is the imposition of the sanction of suspension or disbarment, which is and would in any event be publicized.*/

The proceedings that would be significantly affected by the proposed change in Rule 2(e)(7), therefore, would be original proceedings, where the Commission must before imposing sanctions make its own independent findings that the professional is lacking the "requisite qualifications to represent others," is lacking "character or integrity," has engaged in "unethical or improper professional conduct," or has willfully violated or aided or abetted the violation of the federal securities laws or rules and regulations thereunder.**/

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*/ Suspension or disbarment is automatic under Rule 2(e)(2) in cases of disbarment by other authorities and of criminal conviction, and suspension may be imposed without hearing under Rule 2(e)(3)(i) in civil injunctive proceedings. In the latter cases, a decision of the Commission is required, "with due regard to the public interest," but this decision is made ex parte. In all cases, in sum, if a sanction is imposed, it is done without hearing, and there is in practical effect no difference in time or in substance between the initiation of the proceeding and its publicized conclusion.

**/ Rule 2(e)(1).

As to these proceedings, unlike the derivative ones, the Commission may not under the Rule impose any sanction until after an opportunity for hearing.

The principal impact of the proposed changes with respect to such original proceedings would result from the Commission's making public the Order for Proceeding which formally initiates the proceeding. The phrase "all proceedings," in the proposed amendment, is presumably intended to be all-inclusive, and to comprehend not only evidentiary hearings but also motions, arguments before the administrative law judge, initial decisions and appeals to the Commission. While technically "public," however, none of these stages would be attended by the same kind of publicity as the Order for Proceeding. Presumably none would, like the initial Order, be publicized by the Commission itself.*/ Similarly, we assume, the records of proceedings, whether pending or concluded, would also be made accessible to the public. This is not now the case except with respect to proceedings which have been concluded by a determination adverse to the respondent. However, such records also would not normally be widely publicized.

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*/ It may be suggested that pending non-public proceedings sometimes become known because third parties called as witnesses necessarily learn of the pendency of the proceedings in which they testify. However, even if some such leakage is unavoidable, it is not equivalent to the affirmative, official, widespread publicity that would result from the public announcement of the Commission's Orders for Proceeding.

Thus, in practical terms, the significant effects of the proposed change in Rule 2(e)(7) would be two-fold: first, and most importantly, it would result in the Commission giving publicity to the initiation of Rule 2(e) proceedings, and of the charges laid therein, in all cases where those charges ultimately were not sustained after a hearing; and secondly, in those cases where some or all of the charges ultimately were sustained, it would result in publicity being given to such charges at an earlier time, and frequently in a different form, than is the case under the present practice where the Commission's release publicizes only the results of the proceeding. We submit that neither effect is justified by the Release, or is otherwise justifiable.

II

THERE ARE COMPELLING CONSIDERATIONS AGAINST THE PROPOSED CHANGE

In net effect, the proposed Rule 2(e)(7) would contemplate the routine imposition of the severe sanction of adverse publicity upon the respondent professional prior to any opportunity for hearing, prior to any decision on the evidence or the law, and even in cases where a decision favorable to the respondent is ultimately made

The severity of the sanction stems from the fact that a professional person's reputation is his most valuable, and

most fragile asset. The importance of professional reputation, and its vulnerability to charges of incompetence or want of integrity, have recently been recognized by Commissioner Sommer, speaking of the damage that can be done to professionals by litigation:*/

> "All of us know of the dramatic and unfortunate impact any litigation questioning the conduct of a professional can have on his career, as well as his finances. Corporations can withstand legal attacks and go forward to thrive and not infrequently corporate executives can do the same. However, it is far more difficult for a professional to retain his community standing, his self-respect and his financial security after questions have been raised publicly concerning his integrity or his competence."

Commissioner Sommer went on to say that "the Commission and its staff must be extremely cautious when it is confronted with a seeming involvement of counsel in securities misconduct."**/ That caution, which is surely called for with respect to any matter that may give rise to a Rule 2(e) proceeding against any professional, would be abandoned by the proposed changes in Rule 2(e)(7).

The damage done by publicizing formal charges of professional incompetence or misconduct, particularly where

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*/ A. A. Sommer, "Emerging Responsibilities of Securities Lawyers", CCH Fed. Sec. L. Rep. ¶ 79,631 at p. 83,692 (January 1974).

**/ Id.

those charges bear the imprimatur of an agency of the federal government, is in major part irreparable. Potential clients deciding which professional or firm to engage, and young professionals choosing a firm with which to initiate their careers, cannot postpone their decisions, and are not likely to suspend their judgments, until charges against a particular firm have been adjudicated. Even where there is ultimate exoneration, the fact of exculpation will seldom be as widely circulated as the charges; and even if it is, it will neither cure the damage already done nor entirely eliminate the taint on reputation resulting from the fact that charges once were made.

As the Wells Committee pointed out,*/

> "Commencement of a formal enforcement proceeding is a matter that is likely to be of very great consequence to the person or entity named in the proceeding. If the party named, for example, is a corporation whose shares are publicly owned or a large brokerage firm, shareholders, employees or other persons who are themselves in no way responsible for any unlawful conduct may be adversely affected. Moreover, the relief sought by the Commission, even if granted, may not be as significant or as onerous a sanction as the publicity attendant upon the commencement of the proceeding." (Emphasis added.)

The Wells Committee was referring to statutory enforcement proceedings, not proceedings under Rule 2(e), but its

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*/ Report of the Commission's Advisory Committee on Enforcement Policies and Practices, BNA Securities Regulation & Law Report, June 28, 1972, page 9.

observation concerning the impact of publicity has even greater force with respect to professional respondents in the latter proceedings.

Recognition of the irretrievable harm that may be done to professional reputations by the mere publication of charges of professional incompetence or misconduct surely underlies the predominant practice with respect to disbarment of lawyers: that, until and unless there is an adverse determination -- and often even then, if the sanction is less than disbarment or suspension -- the proceedings are non-public. In 1970, a Special Committee of the American Bar Association chaired by former Justice Clark of the Supreme Court, observed that this was the majority though not universal rule, and recommended that it should become uniform practice. The Committee asserted:*/

> "Until proof has been adduced that an attorney has been guilty of misconduct, a complaint against him is no more than an accusation. Disclosure of the existence of that accusation may itself result in irreparable harm to the attorney. His practice may be diminished, if not substantially destroyed, by the resulting lack of confidence of old and new clients, judges before whom he has to appear and fellow attorneys with whom he must negotiate."

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*/ ABA Special Committee on Evaluation Of Disciplinary Enforcement (June 1970), 95 Reports of the American Bar Association 934-35 (1970).

The same reasoning, of course, applies to accountants.*/

Similar considerations, indeed, appear to underlie the uniform practice of the federal government with respect to serious disciplinary proceedings against its own employees. Until recently, hearings with respect to disciplinary charges were invariably non-public; and the rule now is that an exception will be made only in cases where the employee requests that the hearing be public.**/

The impact of the proposed change in Rule 2(e)(7) would be felt most keenly by those professionals against whom disciplinary charges ultimately were not sustained. As to these, it is difficult to discern the slightest trace of fairness in a procedure which administers punishment despite ultimate formal exculpation. No comprehensive information appears to be available as to the number or frequency of Rule 2(e) proceedings in which the charges are ultimately dismissed, but clearly there are some.***/ Moreover,

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*/ See also 31 C.F.R. § 10.90(b)(hearings in disciplinary proceedings with respect to practitioners before the Treasury Department may be public if the practioner requests); In re Francis J. Charlton, FTC Dkt. No. 129-8, order dated Sept. 18, 1973, CCH Trade Reg. Rep. ¶ 20,476 at page 20,404 (hearing in disciplinary action held in camera).

**/ See 5 C.F.R. §§ 771.210(i), 772.305(c)(5); 38 Fed. Reg. 10247 (April 26, 1973). Cf. Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972).

***/ Cf. In the Matter of Myers, A.S.R. No. 92, July 16, 1962, (dismissing charges against an unnamed accounting firm, while imposing sanctions on the individual respondent); A.S.R. No. 77, February 19, 1954.

inherent in the Commission's dual role as accuser and adjudicator in Rule 2(e) proceedings is the assumption that some charges will be brought that prove to be unfounded.

The Commission's approval, in its prosecutorial role, of the filing of charges cannot -- as a matter of due process -- be tantamount to a decision by the Commission, in its justiciating role, that the charges are true. The exact standards applied by the Commission in determining whether to approve a staff proposal for the institution of disciplinary proceedings and for determining after hearing whether the charges have been sustained, are not publicly available; but it is nonetheless clear that the standard for the first is, or is meant to be, lower than that for the second. Thus, speaking of the decision to initiate administrative proceedings, the Commission's Chairman recently observed:*/

> "[Y]ou have to remember that we, at this point, are still administrators, guessing about possibilities and probabilities, not adjudicators making findings and drawing conclusions. The issue is simply this: Does the staff deserve, and is it in the public interest to give it, a chance to prove its case?"

It may be that in the majority of Rule 2(e) proceedings, the staff's charges are ultimately sustained. Even for this category of cases, however, imposing the sanction

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*/ Ray Garrett, Jr., "A Look At The SEC's Administrative Practice" (April 25, 1974).

of publicity at the start rather than the conclusion of the proceeding would be grossly unfair. For one thing, punishment would occur before any of the due process protections purportedly extended to respondents could come into play. For another, the publicity at the commencement of the proceeding would include all charges which the Commission has decided to give its staff a "chance to prove"; the publicity at the conclusion would pertain only to those charges which the staff had succeeded in proving. Surely again, the latter are frequently different from the former.

There is an implication, in the Release's reference to the Commission's "small staff, limited resources, and heavy responsibility," that the proposed change in Rule 2 (e)(7) is seen as a new and more effective enforcement tool. This could be true, of course, if the change were viewed either as a means of punishing by publicity rather than by formal sanction after hearing; or as offering the threat of publicity as a means of negotiating more and better consent settlements, which play so large a part in the Commission's enforcement effort. Although we share the Commission's concern about the size of its staff and budget, we suggest that the solution to this problem is, as the Wells Committee recommended, enlargement of the staff and budget -- not the adoption of unfair enforcement techniques.

If the publication of charges before they are proved is viewed as an enforcement tool in itself, by reason of its imposing a sanction without the necessity of hearings, it is obviously improper and unfair.*/ Applied prior to hearing, it would make a mockery of the procedural protections supposedly afforded professionals in Rule 2(e) disciplinary proceedings.

If the proposed change is seen as a means of improving the staff's bargaining position in securing consent orders -- a bigger stick behind the back -- then it is hardly fairer. Bargaining for consent orders in Rule 2(e) proceedings is now conducted under the threat that a proceeding, if brought, would be successful. This presumably means that where a consent order is secured, the consenting respondent has concluded that there is a substantial probability that the evidence of professional misconduct will be such as to meet the Commission's standards (whatever they may be) for the final adverse determination. Under the Rule as proposed to be changed, there would only need to be evidence sufficient to meet the Commission's lesser, but undefined, standard for approving an Order initiating Rule 2(e) proceedings -- and the respondent would have no chance to argue that the

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*/ See Administrative Conference of the United States, 1973 Annual Report, Recommendation 73-1, "Adverse Agency Publicity".

the evidence did not meet that standard. As a practical matter, since the respondent would have no way of assessing the likelihood that a given proceeding would be approved by the Commission, he would be at the mercy of the staff in such negotiations. And the threat which the staff could wield would no longer be that of an ultimate adverse determination, after hearing, but publicity pure and simple.

It should also be noted that as an enforcement tool in either of these respects, the publication of charges under the proposed amendment of Rule 2(e)(7) would frequently prove a two-edged sword, by stiffening resistance of professionals or firms to any compromise. Unable to judge for themselves the likelihood that the Commission would approve particular charges, some respondents might choose to call what seemed to them the staff's bluff. And once a Rule 2(e) proceeding had been instituted, since a severe sanction would already have been imposed, the respondent might well reason that he had little further to lose, and see his only chance of mitigating the damage already done, in litigating the proceeding vigorously to the bitter end.

III

NO LEGITIMATE CONSIDERATIONS OF POLICY JUSTIFY THE PROPOSED CHANGE

We agree with the Commission's statement in the Release that "there is considerable public interest in the standards

required of professionals practicing before it." We submit, however, that this interest would be exceedingly ill-served by the publicizing of charges that have not yet been proven, and particularly those ultimately unsustained.

If the public's interest is thought to lie in knowing what the Commission believes professional standards to be, and if it is thought desirable to dramatize the Commission's views by identifying professionals who have failed to meet those standards, surely this illumination can be adequately accomplished by publicizing the results of the proceedings in which professionals have been duly found wanting. We suggest, however, that the Commission does not need a culprit, or disciplinary proceedings, as a medium for expressing its views on such matters.*/

The Release also suggests that "when sufficient reason exists to institute such a proceeding, the public should be aware of this fact and have available the evidence supporting and refuting the charges made." This proposition has several faults. First, surely the interest of the public attaches to the ultimate determination of the issues in a proceeding, not to the evidence presented on one side or the

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*/ Thus, the Commission has in a series of releases made clear its views about the standards by which the independence of accountants should be reasoned. E.g., A.S.R. No. 126, July 5, 1972.

other, which will not be fully accessible to it as a practical matter, and which in any event the public is hardly in a position to appraise. Second, the Commission's release announcing its Order for Proceedings under Rule 2(e), which would be the event receiving greatest publicity, would not make the public aware of the evidence supporting the charges; and certainly not of the evidence refuting them. And finally, the reference to "sufficient reason" for instituting a proceeding seems to suggest either (1) that in the Commission's view there is no real difference between the standards applicable to the institution and to the determination of a proceeding, or else (2) that there is the same degree of public interest in knowing that there is some evidence to sustain a charge of misconduct, even though not enough to persuade a trier of fact, as in knowing when misconduct has been proven. To state either proposition is to refute it.

The Release also suggests that making Rule 2(e) proceedings public would serve the interests of those who practice before the Commission. If this is intended to refer to the interests of those professionals who become respondents in such proceedings, it could of course be better dealt with not by a general rule but instead simply by a rule providing that where the respondent so requests, a hearing will be public. If, on the other hand, such professionals have some

other, more widely shared interest in learning which of their colleagues are being subjected to the ordeal of punishment by publicity before trial, the Release does not suggest what it is, nor does it occur to us.

The Release also refers to a "considerable public interest" in the disciplinary proceedings in which professional standards are enforced. If what this means is that there is an interest in the fact that the Commission is bringing such proceedings, and thus demonstrating its diligence, surely this can be satisfied by publishing the results of the proceedings where an adverse determination has been made, or by publishing statistics with regard to the number of proceedings brought and the nature of their ultimate disposition. If, on the other hand, what is intended to be suggested is an interest in the disciplinary machinery itself, with a focus on whether administrative justice is being properly meted out, we submit that this interest does not outweigh the very significant interest of professional respondents in avoiding unnecessary damage to their reputations.

What is perhaps being invoked in this regard is the tradition in American jurisprudence that court proceedings are public, particularly in criminal cases,*/ and to a lesser extent in civil cases as well.**/ Although with respect to

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*/ In re Oliver, 333 U.S. 257 (1948).

**/ See Fed. R. Civ. P. Rule 77(b).

criminal trials this tradition rests upon the Sixth Amendment, which guarantees to the accused a "public trial," it has also sometimes been justified in terms of an independent public interest in knowing that the processes of justice are working properly.*/ It may perhaps be thought that there is a similar interest in assuring public confidence in the fairness of the Commission's administrative proceedings. The fact is, however, that the tradition of public court trials, and the Constitutional amendment that embodies it, rest upon a rejection of historical judicial abuses such as the Star Chamber, and is principally concerned with protecting the rights of a criminal accused.**/ We submit that to the extent that there is an interest in preventing the Commission's disciplinary proceedings from taking on the characteristics of the Star Chamber, this can be quite sufficiently served by giving the respondent the right to opt for public proceedings.

The Release also suggests that the change in Rule 2(e)(7) might be justified because it would bring practice under that Rule into conformity with Rule 11(b), which applies to all administrative hearings except those under Rule 2(e). We submit that mere abstract symmetry between the rules is a consideration deserving no weight at all, and that there is no

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*/ See United States v. Consolidated Laundries, 266 F.2d 941, 942 (2nd Cir. 1959); United States v. Lopez, 328 F. Supp. 1077, 1087 (E.D. N.Y. 1971).

**/ See In re Oliver, 333 U.S. 257, 266-73 (1948).

other reason for adopting the 11(b) pattern in 2(e)(7).

First, unlike Rule 2(e) proceedings, all of the proceedings subject to Rule 11(b) have a statutory basis of authority; and each of these statutory provisions specifically contemplates public hearings.*/ There is with respect to Rule 2(e) proceedings no such expression of Congressional intent.

Second, all, or virtually all, of the potential respondents in such administrative proceedings under Rule 11(b) are subject to substantial regulation, including disclosure requirements which expose them to public scrutiny regardless of whether proceedings are brought against them -- which is not so with respect to the professionals who are subject to Rule 2(e).

Third, most of the categories of potential respondents under Rule 11(b) are corporate entities. Although as the Wells Committee recognized, even the exposure of corporations to the publication of charges prior to hearing may do damage

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*/ Section 21 of the Securities Act of 1933 mandates a public hearing, but applies only to hearings involving the sufficiency of documents, and not charges of culpability or misconduct of individuals or even corporations. All the other provisions specify without criteria that such hearings "may" be public: Securities Exchange Act of 1934, Section 22; Public Utilities Holding Company Act of 1935, Section 19; Trust Indenture Act of 1939, Section 320; Investment Company Act of 1940, Section 41; Investment Advisors Act of 1940, Section 212. See also ALI Federal Securities Code § 1513(e)(Tentative Draft No. 3).

to innocent persons,*/ Commissioner Sommer has aptly pointed out that the potential for damage to professionals as respondents is much greater.**/

Fourth, none of the respondents in the proceedings to which Rule 11(b) applies are professionals in the same sense as lawyers and accountants. To be sure, some respondents are individuals, or partnerships -- for example, brokers and dealers. Even though not members of a learned profession, they too may suffer significant damage to reputation as the result of the mere publication of charges. Yet apparently in recognition of this factor, according to the Wells Committee report, the Commission has usually exercised its authority under Rule 11(b) in proceedings involving brokers and dealers, to make them non-public.***/ If the Wells Committee was correct, and continues so, on this point, then the proposed change in Rule 2(e)(7) would not really bring the practice with respect to non-corporate respondents under Rules 2(e) and 11(b) into conformity unless it is proposed that the Commission abandon its practice of having most hearings involving brokers and dealers non-public, or else it is in-

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*/ See page 8, supra.

**/ See page 7, supra.

***/ Wells Committee Report, Note page 8 supra, at page 12.

tended that despite the proposed change in Rule 2(e)(7) most Rule 2(e) proceedings will continue to be private. We note, in this regard, that the disciplinary proceedings of the self-regulatory bodies having jurisdiction over brokers and dealers -- that is, the Exchanges and the NASD -- are invariably non-public.*/

Finally, a few words should be said about another of the Commission's enforcement tools -- namely, civil injunctive actions. The Commission has increasingly named professionals, both accountants and lawyers, and their firms, among the defendants in such actions; and appears to regard injunctive proceedings as an alternative to disciplinary proceedings (or as a means of securing dual relief in a single proceeding through invocation of Rule 2(e)(3)(i)) in dealing with professional malfeasance.

The relationship between the two kinds of proceedings raises some fundamental questions which are beyond the scope of the present comments -- for instance, as to what the criteria should be by which a decision is made to proceed in one fashion rather than the other; as to the comparative weight of evidence necessary for the Commission to authorize

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*/ It is noteworthy that the proposed National Securities Market System Act of 1974, recently passed by the Senate, clearly contemplates that such disciplinary proceedings by self-regulatory bodies will remain non-public unless and until an adverse determination has been made. See, S. Rep. No. 93-865, p. 22; S.2519, Sec. 19(d).

the institution of each; and as to the balance presented by each mode between protection of public interests and procedural assurances of fairness to the defendant/respondent. The point requiring discussion here is that where an injunctive action is brought against a professional, the complaint itself, with its unanswered and unproven charges, is publicly announced by the Commission just as an Order for Proceeding under Rule 2(e) would presumably be routinely announced if the change under discussion were adopted. Such publicity, of course, carries the same potential for damaging the professional defendant as that which would occur under a revised Rule 2(e)(7). Whether the damage is greater with one sort of proceeding or the other may well be mooted: on the one hand, a lawsuit is likely to be more widely reported in the press than a Rule 2(e) proceeding; on the other hand, the charges laid in a Rule 2(e) proceeding -- of professional incompetence or misconduct serious enough to warrant forfeiture of the right to practice -- may be more grave than a charge of having violated a complex regulatory statute.

In any event, the fact that civil injunctive actions are thought by the Commission to be available as an alternative means of achieving the same purposes as Rule 2(e) proceedings, and the fact that they are ordinarily highly publicized from the very start, may raise the question whether

Rule 2(e) proceedings should not be equally publicized. The answer, we submit is no.

In the first place, as has already been discussed, the fundamental reasons of policy underlying the American tradition that court proceedings are public could, to the extent that they are applicable to administrative disciplinary proceedings, be adequately served by giving the respondents a right to require the hearings to be made public.*/

In the second place, the general tradition of public court proceedings does not encompass any immutable requirement that the identity of parties be made publicly known, let alone that they be highly publicized. There is, indeed, a tradition of anonymous designation of parties, in both criminal proceedings**/ and civil ones,***/ where public identification may result in unnecessary damage to reputation or humiliation. As to disciplinary proceedings by courts against attorneys, Judge Cardozo observed:****/

> "There is a practice of distant origin by which disciplinary proceedings, unless issuing in a judgment adverse to the attorney, are recorded as anonymous."

We recognize that in injunctive actions in which professionals are named as defendants there are ordinarily a

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*/ See pp. 17-18 supra.

**/ See, e.g., Anonymous Nos. 6 and 7 v. Baker, 360 U.S. 287 (1959) (contempt conviction).

***/ Roe v. Wade, 410 U.S. 113 (1973) (class action challenging constitutionality of abortion laws).

****/ People ex rel. Karlin v. Culkin, 248 N.Y. 465, 162 N.E. 478, 492-93 (1928).

variety of other defendants as well. In light of this, it would doubtless be impractical to designate the professional defendants pseudonymously, and an end to the practice of publicizing complaints might mean the loss of some legitimate benefits (of which we assume that simple punishment by publicity is not thought to be one). We are not, therefore, suggesting here that the Commission's practice with regard to court proceedings be changed. We do, however suggest that there is no good reason for importing those practices into disciplinary proceedings, where only professionals are respondents; and where the damage done by publicity is most acute and least justified.

IV

OTHER CHANGES IN RULE 2(e)(7) WHICH WOULD BE DESIRABLE

Although as explained above, we oppose the principal change in Rule 2(e)(7) on which comment has been invited, our study of that Rule in the preparation of these comments has suggested some other changes in Rule 2(e)(7) which we take this opportunity to commend to the Commission's consideration.

First, we suggest that the prefatory phrase proposed in the Release, to make Rule 2(e)(7) apply to all proceedings, and not merely hearings, should be adopted. It is the present practice to treat all aspects of the proceeding as non-public. We believe it would be desirable to confirm this practice in the Rule itself.

Second, we suggest that a respondent should have a right to have a proceeding public if he wishes it to be. Indeed, respondents probably already have such a right, enforceable by court action:*/ we suggest that it be recognized in the Rule. That right should be subject to limitation only in cases where there is more than one respondent, and one or more of the respondents desires that the proceeding be non-public.**/ In such a case the interest in protecting professional reputation against damaging publicity should override the interest in publicity. We suggest that Rule 2(e)(7) be changed to spell this out.

Third, we suggest eliminating entirely the authorization for the Commission to require any proceeding to be public except where requested by the respondent. We have not conceived of any case where it would be appropriate for the Commission to require a proceeding to be public. And, as has been pointed out, the Commission has never exercised its present authority to make one public.

Finally, if these changes were adopted, it would also be appropriate to make clear in the Rule that final adverse

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*/ See Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972).

**/ Cf. ALI Federal Securities Code § 1513(e)(1) (Tentative Draft No. 3).

determinations by the Commission (and derivative suspensions) would continue to be made public, as under present practice; and that in such cases the record of the proceeding would, again as in present practice, be made public.

If amended in accordance with the foregoing suggestions, Rule 2(e)(7) would read as follows:

> "(7) All proceedings pursuant to paragraph (e) of Rule 2, including any hearings held therein, shall be non-public unless all respondents request that any such proceeding be public, in which case such request will be granted. An order of the Commission imposing sanctions, or sustaining charges against a respondent, may at the Commission's discretion be made public, in which event the record of the proceeding will also be made public."

CONCLUSION

The changes in Rule 2(e)(7) proposed by the Release would represent a sharp departure from the prior uniform practice of the Commission, and from the general practice of other agencies in analogous proceedings involving disciplinary actions against professionals. They would, by publicizing the charges of professional incompetence or misconduct before hearing and adjudication, impose a severe sanction against the professional respondent, of damage to reputation which would frequently be irreparable. The result would be unfair, unjustified by any legitimate consideration of

public interest, and very possibly counterproductive.

We therefore urge the Commission not to approve the changes proposed in the Release.