

July 15, 2002

By Hand Delivery

The Honorable Harvey L. Pitt, Chairman
United States Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Dear Chairman Pitt,

We are Chair and Vice-Chair, respectively, of the American Bar Association's Committee on Federal Regulation of Securities and write regarding the SEC's June 27, 2002 Order requiring chief executive and chief financial officers of 947 public companies to certify the accuracy of their company's most recent annual report on Form 10-K and subsequent filings to the date of the certification. The certifications are to be filed with the SEC no later than the due date of the next report required to be filed on or after August 14, 2002. This letter contains our individual views and does not represent the official position of the ABA, the Section of Business Law or the Committee.

We recognize that these are extraordinary times in which the SEC – indeed, the federal government as a whole – is striving to exercise its authority in creative and sometimes unprecedented ways in order to address wrongdoing and restore public confidence. We support that goal and commend the Commission for the forceful actions it has taken in this regard. Furthermore, we appreciate the value of the Commission acting decisively on the issue of certification of corporate disclosures and understand that many senior corporate officers are quite prepared to voluntarily make such certifications to help restore investor confidence. However, we and a number of other members of the Committee do not believe that the Order is an appropriate use of the Commission's investigative powers under Section 21(a) of the Securities Exchange Act of 1934. We are concerned that this unprecedented Order circumvents the rulemaking process and should not be viewed as either a normal, or preferred, avenue for future SEC directives.

On June 17, 2002, the Commission proposed Rules 13a-14 and 15d-14, which would require similar certifications on a going forward basis. The Committee expects to comment on these proposals in due course. The notice and comment process ensures that the SEC receives information from the public regarding the potential impact of the proposed rules before they are enacted. We believe this comment process fosters careful and thoughtful rulemaking, and we appreciate the Staff's and the Commission's thorough review of all comments submitted in connection with this process.

During the pendency of this comment period, the Commission issued the Order pursuant to Section 21(a). That section provides that the Commission may, "in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this title . . . and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated." It also provides that the Commission "is authorized, in its discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in enforcement of [the federal securities laws and related rules and regulations, including self-regulatory and other rules], in the prescribing of rules and regulations under this title, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this title relates."

The Commission's June 27 Order states that it "has commenced an investigation to ascertain facts, conditions, practices and other matters relating to the financial statements and accounting practices of certain large publicly traded companies." This investigation's purpose, the Order says, is "to provide greater assurance to the Commission and to investors that persons have not violated, or are not currently violating, the provisions of the federal securities laws governing corporate issuers' financial reporting and accounting practices, and to aid the Commission in assessing" whether to modify its rules and/or recommend legislation to Congress governing corporate issuers' reporting and accounting practices. The Commission's Frequently Asked Questions statement regarding the Order states that the Commission will make the sworn statements public after they have been filed.

Although Section 21(a) does provide broad authority, legitimate questions exist as to whether that authority is sufficient to require more than 1,800 corporate officers to submit sworn statements in the form required by the Order, and to publish those statements upon receipt. Although, as the Order points out, there have been "recent reports of accounting irregularities at public companies, including some large and seemingly well-regarded companies," even the Commission's Order does not suggest that the SEC has commenced an investigation into possible accounting irregularities at 947 companies. Moreover, the Order does not appear to be designed to seek "all the facts and circumstances concerning the matter to be investigated," as Section 21(a) authorizes, unless the officers choose to file such a statement in lieu of the requested form. In addition, it is likely that many, if not most, of the forms filed in response to the Order will not constitute "information concerning any such violation," which is the Section 21(a) measure allowing the Commission to publish the statement.

In short, although Section 21(a) investigations can provide important data for the Commission to use in evaluating whether to adopt new rules or seek legislation, it is not clear that Section 21(a) sworn statements can be required outside the context of investigations of specific possible violations of federal securities laws or related rules. Because of the importance of these issues, we have formed a task force of the Committee, consisting of distinguished securities law practitioners and former SEC officials, to consider the scope of the Commission's

The Honorable Harvey L. Pitt, Chairman

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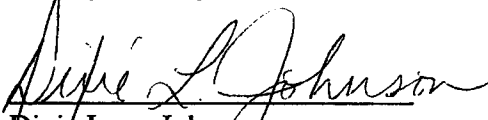
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Section 21(a) authority. We hope the report of this task force will be useful in defining that authority.

We know you share our concern over the importance of maintaining the integrity of the legal process and preserving the rule of law. This is true even – and some might say especially – in extraordinary times. Therefore, we urge the Commission not to view this Order as precedent for future potential uses of Section 21(a) investigative powers in a manner that risks challenges to the integrity of the rulemaking process.

Sincerely,


Stanley Keller


Dixie Lynn Johnson



DIVISION OF
CORPORATION FINANCE

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

July 23, 2002

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Dear Mr. Keller and Ms. Johnson:

Chairman Pitt has asked us to respond to your letter of July 15th regarding the Commission's Order Requiring the Filing of Sworn Statements pursuant to Section 21(a)(1) of the Securities Exchange Act of 1934. Your letter, while noting that Section 21(a) provides the Commission with broad authority, appears to suggest that questions could be raised regarding whether the Commission used that authority properly when it issued the order. Your letter also indicates that you, as Chair and Vice-Chair of the American Bar Association's Committee on Federal Regulation of Securities, have formed a special Committee task force to consider the scope of the Commission's Section 21(a) authority.

We very much agree that Section 21(a) provides the Commission with broad authority, and we believe that this authority is more than ample to allow us to investigate the 947 listed companies in the manner that the Order provides. Further, we do not take your letter as challenging the Commission's authority with regard to the Order. Rather, your letter merely raises questions that should be considered whenever the Commission acts and, of course, were considered in this case. The Commission states clearly in the Order that it has "commenced an investigation to ascertain facts, conditions, practices and other matters relating to the financial statements and accounting practices of certain large publicly traded companies." The Commission further states that, as part of that investigation, it "believes it necessary to require written statements, under oath, from senior officers of certain publicly traded companies, identified in the list attached..." We believe that this action is very much of the type that Section 21(a) authorizes the Commission to undertake.

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Your letter also raises a question regarding whether the Commission's pending rulemaking casts doubt on its authority to issue the Order. The pending rulemaking does not cast doubt on the Commission's authority to issue the Order for a number of reasons. The Commission, like many other regulatory agencies, has explicit authority to act by both rule and order. Such authority is clear under the Exchange Act. Further, the purposes of the proposed rulemaking and the Order are very different. The Order is a backwards looking, one-time requirement, designed to elicit past facts and circumstances, that officers review previously filed reports and confirm their accuracy and completeness. The rule proposal, conversely, would be an on-going requirement to certify each report at the time of its filing and is intended to provide assurances of increased involvement by the certifying officers in the preparation of each report. The fact that both the Order and the proposed rule use statements by officers to accomplish their significantly different purposes does not cast any doubt on our authority. Your concern expressed at the end of your letter that the Commission not use this Order as precedent for future use of Section 21(a) is therefore misplaced.

We also disagree with your suggestions regarding the publication of the responses to the Order. As you know, the Commission has previously published statements pursuant to Section 21(a) when neither the statement, nor the Commission in an order, has explicitly stated that any violations of the federal securities laws occurred. In addition, the Commission generally has authority to publish any material in its possession unless provisions of law or regulations, such as those relating to privacy, preclude it from doing so. As a matter of policy, we are sure you will agree that many corporations, CEOs, CFOs and of course investors feel it is vitally important that the Commission make public all of the statements received pursuant to the Order.

Finally, with respect to the task force you have formed to consider the Commission's authority under Section 21(a), you know that we always appreciate the thoughtful views of organizations such as the American Bar Association. We would urge that you ensure representation on the task force of the broadest possible spectrum of views, including of course those who bring the perspective of investors and investor interests to your deliberations. We are also confident that the task force will reach conclusions that are focused on the legitimate questions of authority with which we should all be concerned. We must all be careful not to succumb to the temptation to conflate over-reaching of authority with bold steps by independent, principled institutions that are necessary to address current issues facing the country.

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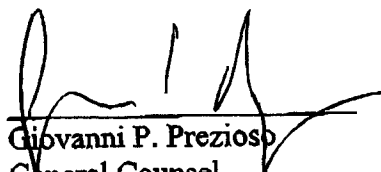
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Thank you for taking the time to write and presenting your views on these important matters. We also look forward to hearing from you and the Committee task force regarding its consideration of these matters.

Yours truly,



Alan L. Beller
Director
Division of Corporation Finance



Giovanni P. Prezioso
General Counsel
Office of General Counsel

Reviving Old Methods for Real Time Enforcement*

(June 2002)

As Congress considers whether to expand SEC enforcement remedies, the Commission and its Staff are reviewing their existing, but underutilized, authority for additional means of achieving "real time enforcement." This article describes the SEC's authority to require submission of a "written statement" describing facts and circumstances under investigation.

By Dixie L. Johnson and Paul H. Pashkoff

Dixie L. Johnson is a partner, and Paul H. Pashkoff is an associate, at Fried, Frank, Harris, Shriver & Jacobson in Washington, D.C.

In recent months, Stephen M. Cutler, the Director of Enforcement of the Securities and Exchange Commission (the "Commission"), has suggested that the Commission and its Staff are considering whether to make more frequent use of statutory authority used only occasionally behind the scenes for the last 20 years. Those enmeshed in enforcement investigations should be aware of what he has described as the "other prong" of Section 21(a) of the Securities Exchange Act of 1934.

Previous Use of the "Other Prong" of Section 21(a)

* This article previously appeared in the June 2002 edition of *Insights*.

Section 21(a) is most widely known as the authority for SEC Reports of Investigation, announcing results of investigations outside the context of injunctive or administrative enforcement actions. The Commission uses this vehicle to publicize matters of investor concern, to highlight the need for new legislation, and to comment on standards of industry conduct.¹ In October 2001, the SEC used Section 21(a) to issue a highly-publicized Report of Investigation setting forth factors it will consider when evaluating whether to give credit to a company for cooperating with the agency.²

The other, less known, provision of Section 21(a) allows the Commission to require or permit any person to file with it a written statement “as to all the facts and circumstances concerning the matter to be investigated.” This “other prong” last appeared publicly in 1979 and 1980.

On March 21, 1979, the Commission announced that, where appropriate and in the public interest, persons may be allowed to resolve their involvement in an SEC investigation by submitting written statements to the Commission with the expectation that the statements would be published.³ The release confirmed that such statements would: (1) describe the principal aspects of the matter; (2) discuss the person’s particular role; and (3) present any representations or undertakings such person may wish to make regarding future conduct. Although the Commission’s acceptance of the statement would not foreclose other federal or state authorities from filing charges, the release confirmed that the Commission would consider accepting such statements in lieu of enforcement actions in appropriate contexts.⁴

That same day, the Commission published a signed statement by two individuals who had been involved in an informal investigation by the SEC’s Division of Enforcement.⁵ The statement confirmed that, while the individuals were negotiating to

purchase Albert's Inc., a women's clothing retailer, they learned of a competing bid at a much higher price. Without disclosing the existence of the higher bid, they purchased shares of Albert's Inc. at several dollars per share under the competing bid price. To resolve the matter, their statement confirmed that they would offer rescission to those from whom they purchased the shares. The Commission made no findings of fact or law; other than a brief introduction, the release is simply a copy of the signed statement.⁶

The use of Section 21(a) in this manner sparked a controversy within the Commission. Commissioner Roberta Karmel filed a dissent arguing that the practice amounted to the creation of a new administrative remedy. Unlike the more familiar Section 21(a) Reports of Investigation, these written statements involved neither SEC findings of facts nor an SEC conclusion that the facts constituted a violation of the federal securities laws. Section 21(a) authorizes the Commission to investigate whether violations have occurred, and, "in its discretion, to publish information concerning any such violations."⁷ The statute does not specifically authorize the Commission to release written statements submitted pursuant to Section 21(a) if the Commission has not concluded that a violation occurred. Commissioner Karmel argued that the mere publication of a negotiated statement setting forth admissions and undertakings by a person under investigation constitutes a sanction. By levying a sanction without formally finding a violation of law, she asserted, the Commission exceeded its statutory authority.⁸

The majority of the Commission was not persuaded by these arguments and published at least five signed statements pursuant to Section 21(a) in 1979 and 1980, with Commissioner Karmel dissenting in each instance during her tenure.⁹ Then, without explanation, the SEC abruptly stopped publishing Section 21(a) statements.

The Staff, however, continued to seek — and still seeks — written statements regarding facts under investigation, sometimes citing Section 21(a) as authority. The Staff's references to Section 21(a) suggest that the Commission might order the production of a statement if it were not produced voluntarily. The SEC traditionally makes its orders public, and no such order has ever been announced. Even when the Commission was publishing Section 21(a) statements to resolve investigations in 1979 and 1980, it published no orders requiring the submission of such statements. This suggests that those from whom the Staff sought statements either submitted them voluntarily or found other ways to satisfy or challenge the Staff. Nevertheless, Mr. Cutler's comments suggest that the Commission may be considering whether to expand its use of written statements both to further investigations and to resolve them.

Points to Consider when Dealing with Section 21(a) Requests

In light of Mr. Cutler's hints and the SEC's focus on real time enforcement, practitioners should be on the lookout for increased Section 21(a) written statement requests in enforcement investigations. Here are some things to keep in mind when faced with an SEC Staff request to produce a written statement.

1. Written statements can take many forms. It is common practice for the SEC Staff and self-regulatory organizations to request, and for companies to provide, chronologies summarizing significant meetings and telephone calls leading up to public announcements that preceded strong movement in the company's stock price. Upon request, companies also frequently confirm the names of persons who were informed of those announcements before the news was released publicly, and they confirm known relationships between corporate officials "in the know" and persons on a list of names provided by the regulators. Individuals often file sworn affidavits describing events

relevant to the investigation. A company, its audit committee or counsel also may produce, in an effort to cooperate with the SEC Staff, an internal investigation report or a written explanation of certain accounting decisions made by the company about which the Staff has raised questions. Sometimes, these written statements contain undertakings of remedial measures to address the issues of concern to the Staff. Written statements in a variety of forms often are provided voluntarily to the SEC Staff in an effort to cooperate with the governmental inquiry, and the form of the written statement can be negotiated.

2. ***Written statements may be deemed admissions.*** Whether the Staff uses written statements merely as background information in an enforcement investigation or, as occurred in 1979 and 1980, to resolve publicly an enforcement matter, such statements may be discoverable in private civil litigation, and may be deemed admissions by the SEC or a court. They should be prepared with the care of a sworn affidavit.

3. ***Privilege or work product claims may apply.*** The statement itself may qualify for the protections of the attorney-client privilege, the attorney work product doctrine or other applicable privileges. This can arise, for example, when counsel prepares the statement using information gathered in confidential, privileged communications. Generally, disclosure to a third-party waives the attorney client privilege and puts work product protections at risk. Federal courts have rarely upheld the attorney client privilege in such circumstances, although there have been rare moments of judicial enthusiasm for supporting a self-evaluative privilege to encourage companies to investigate and report illegal activities.¹⁰ Courts are split, however, on the issue of whether production to the SEC should be deemed only a limited waiver of the work-product protection, thereby preserving the work product protections as against third parties.¹¹

4. Confidentiality agreements may not protect written statements from discovery.

In certain circumstances, to further the public interest of obtaining written reports about possible violations of law, the SEC enters into confidentiality agreements with parties providing written statements. At least twice in recent years, when private parties have sought discovery of such reports in litigation, the SEC filed *amicus* briefs supporting protection of work product produced to the SEC Staff pursuant to confidentiality agreements.¹² In these briefs, the SEC urged the courts to protect the confidential status of reports of investigation in order to protect the public interest by preserving the SEC's ability to quickly obtain reliable information, not otherwise available, that facilitates the prosecution of complex enforcement actions. Although courts are reluctant to embrace this view, the SEC's support bolsters a company's good faith privilege and attorney work product claim.

5. The Commission cannot compel production of a written statement that is protected by privilege.

If privilege and/or attorney work product protections generally would prevent discovery of a document, the SEC's power to require production of "a written statement" cannot circumvent those protections.¹³ Yet, although internal investigation reports, interview notes and legal analyses prepared by counsel generally are protected by privilege, the underlying facts are not. The SEC Staff can discover those facts through its enforcement investigation, or perhaps persuade the corporation to produce the privileged materials voluntarily. But the plain language of Section 21(a) raises the question of whether the SEC may instead require the corporation to do the SEC Staff's work for them by explaining the underlying facts in a newly-crafted written statement. It remains to be seen whether the SEC can compel a company to gather facts and create a written statement separate from an existing documents that summarize the same facts gathered in a privileged context. Attempting to force this issue would raise a myriad of legal and practical concerns that are likely to undermine its utility.

6. ***Waivers can be costly.*** If the SEC or its Staff believes privilege and work product protections have been waived, they may seek production of the underlying documents. The Staff even pursued such documents through a subpoena enforcement action in August 2001. In that matter, a company involved in a formal investigation refused to produce an internal investigation report prepared by outside counsel citing the attorney-client privilege and the attorney work product doctrine. Subsequently, in making arguments to Commission's Staff, several of the company's current and former officers allegedly cited to and quoted from the findings contained in, and interviews underlying, the report. Claiming that these statements waived any applicable protection, the Commission sought a court order compelling the company to produce the internal investigation report.¹⁴ The matter apparently was resolved by settlement, and filing the action no doubt slowed the progress of the investigation overall, but it demonstrates the Staff's willingness to litigate to obtain arguably privileged documents where it believes a waiver has occurred.

7. ***The Staff's request is confidential, but a Commission order would likely be public.*** The Staff can *request* a written statement, but only the Commission can *require* a person or entity to submit one.¹⁵ Staff requests typically are confidential; Commission orders requiring actions generally are announced publicly. Even though the order need not include factual findings or conclusions of law, the mere news of its issuance could be interpreted as indicating that a company or individual has not been cooperative with the SEC. This provides the Staff with great leverage when requesting written statements. At present, the Commission provides an important check on the Enforcement Staff in this process, because, unlike subpoena enforcement actions, which can be filed by the Director of the Division of Enforcement, the SEC has not delegated its authority to issue Section 21(a) written statement orders. But in an environment where the Commission

has demonstrated its willingness to penalize corporations that are not fully cooperative during investigations, such a check provides little comfort.¹⁶

8. *Written statements may not be more efficient than testimony.* Any statement provided to a government agency must be accurate.¹⁷ Sometimes preparing and finalizing affidavits takes as much time as providing testimony would, and so preparing a written statement may not be significantly less expensive in every instance. As compared to testimony, affidavits or statements can be less stressful for witnesses and more focused on relevant topics. They also can reduce the need for multiple senior corporate officers and directors to testify before SEC Enforcement Staff, which might be necessary for the Staff to gather background information on its own.

9. *Written statements may be published.* Section 21(a) authorizes the Commission, “in its discretion, to publish information concerning any such violations.” This authority extends to written statements submitted to the Commission, but only if the information concerns a violation. Unlike Section 21(a) reports, written statements generally do not involve a Commission “finding” of a violation, so the SEC may not be in a position to publish the statement itself.¹⁸ In this uncharted area, it is critical to discuss the issue of publication with the Staff and try to reach an agreement or understanding regarding publication prior to submitting the statement.

10. *Written statements provide opportunity for negotiated resolutions without sanctions or collateral consequences.* Although many problems can arise with written statements, if the Commission indeed revives its practice of accepting such statements to resolve investigations, it could facilitate resolutions that otherwise are not currently possible. In 1979 and 1980, when then-Commissioner Karmel cautioned that Section 21(a) written statements constituted sanctions, she focused on the potentially punishing

effect upon a person who has become the subject of a published Commission statement where no finding of violation was included. Even if one viewed the act of publication as a sanction, it does not carry a cease and desist order, censure, bar, disgorgement, monetary penalty or federal court injunction that are present in other resolutions of enforcement actions. In addition, the statute clearly contemplates Commission discretion over whether to publish information about violations it has found during its investigations. This means the Commission could accept written statements, with or without undertakings, to resolve enforcement investigations and could decide *not* to publish them. Whether published or unpublished, and particularly where submitted voluntarily without a Commission order, the statement would not trigger the myriad of collateral consequences that accompany the aforementioned resolutions.

Conclusion

On balance, Section 21(a) written statements may provide "real time enforcement" opportunities for the SEC and its Staff and "cooperation" opportunities for potential respondents. Those who provide the Staff with a comprehensive statement early in an investigation may enable the Staff to evaluate the issues and prioritize its investigation more effectively. This can avoid wasting time and effort during an unfocused investigation of areas that do not merit enforcement attention. In addition, reviving the practice of accepting written statements with voluntary undertakings to resolve enforcement matters would expand the Commission's ability to protect investors by achieving fast and efficient results. The question remains as to whether the Commission will attempt to use Section 21(a) to *require* the creation of written statements. Although the Commission's apparent reluctance to force this issue in the past may have been well-founded, it appears that the "other prong" of Section 21(a) may play a more visible role in enforcement investigations to come.

1 Release No. 34-15664 (Mar. 21, 1979).

2 Release No. 34-44969 (Oct. 23, 2001).

3 Release No. 34-15664 (Mar. 21, 1979).

4 *Id.*

5 Release No. 34-15665 (Mar. 21, 1979).

6 It is important to note that during the time the Commission used Section 21(a) in this manner, the Commission had not yet been granted authority to seek disgorgement or monetary penalties for insider trading or other offenses, or to issue administrative cease and desist orders. *See* Insider Trading Sanctions Act of 1984; Insider Trading and Securities Fraud Enforcement Act of 1988; Securities Enforcement Remedies and Penny Stock Reform Act of 1990.

7 Section 21(a)(1) provides, “The Commission . . . may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. ***The Commission is authorized, in its discretion, to publish information concerning any such violations . . .***” (emphasis added).

8 *See* Commissioner Karmel’s dissenting opinions in Release No. 34-15664 (Mar. 21, 1979); Release No. 34-15665 (Mar. 21, 1979); Release No. 34-15746 (Apr. 18, 1979); Release No. 34-16321 (Nov. 5, 1979).

9 *See* Release No. 34-15665 (Mar. 21, 1979); Release No. 34-15746 (Apr. 18, 1979); Release No. 34-16321 (Nov. 5, 1979). Commissioner Karmel left the SEC in February, 1980. The Commission published two additional 21(a) statements after her departure. *See* Release No. 34-16743 (Apr. 15, 1980); Release No. 34-17002 (July 24, 1980).

10 *See Troupin v. Metropolitan Life Ins. Co.*, 169 F.R.D. 546, 550 (S.D.N.Y. 1996) (holding that the self-evaluative privilege protects the narrative, evaluative, and analytical portions of an internal report). *But see Federal Trade Comm’n v. TRW, Inc.*, 628 F.2d 207, 210 (D.C. Cir. 1980) (stating that courts generally have refused to apply the self-evaluative privilege where the documents in question were sought by a government agency).

11 *Compare In re Steinhardt Partners, L.P.*, 9 F.3d 230 (2d Cir. 1993) (recognizing limited waiver of the work product protection), *with Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991) (rejecting limited waiver of the work-product protection).

12 *See* Brief of the United States Securities and Exchange Commission, *Amicus Curiae* to the Court of Appeals State of Georgia, *McKesson HBOC, Inc. v. Adler*, Civil Action No. 99-C-7980-3 (Ga. Ct. App., filed May 13, 2001); *see also Florida State Bd. Of Admin. v. Waste Mgmt., Inc.*, No. 98 L 6034 (Ill. Cir. Ct. 1999) (agreeing with the SEC’s *amicus* brief and holding that a company did not waive the work-product protection by producing an internal investigation report to the SEC pursuant to a confidentiality agreement).

13 Individuals asserting their Fifth Amendment rights should recognize, however, that the Staff, the Commission and civil courts often will interpret that assertion as an indication that violations did occur. *See Pagel, Inc. v. SEC*, 803 F.2d 942, 946 (8th Cir. 1986) (citing *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976)). Unlike individuals, entities have no Constitutional protection against providing information in response to the SEC’s properly issued subpoena or order. *See SEC v. First Jersey Sec., Inc.* 843 F.2d 74, 76 (2d Cir. 1988); *In re Grand Jury Empanelled March 17, 1987*, 836 F.2d 150, 151 (3d Cir. 1987).

14 *See* Litigation Release No. 17101 (Aug. 13, 2001); *SEC v. USA Detergents, Inc. et.al.*, Misc. No. 01-326 (E.S.) (D.D.C. Aug. 2, 2001).

15 *See supra*, note 7.

16 *See Xerox Settles SEC Enforcement Action Charging Company with Fraud*, SEC Press Release 2002-52 (Apr. 11, 2002) (stating that Xerox agreed to pay a \$10 million penalty, the largest financial fraud penalty ever against a public company, and that “[t]he penalty also reflects, in part, a sanction for the company’s lack of full cooperation in the investigation.”).

17 *See* 18 U.S.C. § 1001 (making it a felony to provide false information to a government agency).

18 However, this language did not stop the Commission from publishing written statements in 1979 and 1980. *See supra*, note 9.