M. Cohen

STATEMENT OF WILLIAM L. CARY, CHAIRMAN, SECURITIES AND EXCHANGE COMMISSION, BEFORE THE SECURITIES SUBCOMMITTEE OF THE SENATE COMMITTEE ON BANKING AND CURRENCY ON REORGANIZATION PLAN NO. 1 OF 1961

JUN 2 1961

Mr. Chairman and Members of the Securities Subcommittee of the Senate Committee on Banking and Currency, I am William L. Cary of the State of New York, and I appear before you as Chairman of the Securities and Exchange Commission for the purpose of discussing Reorganization Plan No. 1 of 1961 which pertains to that agency.

With me today are my fellow Commissioners (Messrs. Gadsby, Woodside and Frear) and the heads of some of our major divisions and offices including Manuel F. Cohen, Philip A. Loomis, Jr. and Walter P. North. I hope that it will be agreeable with you if I call upon them occasionally to supplement my remarks.

A few words of caution are imperative right at the start. In the light of the time available to consider the implications and possible uses which should be made of Reorganization Plan No. 1 (if you permit it to become effective), I would hope that you regard my suggestions as tentative rather than final.

members, who are the persons chosen by the President and confirmed by the Senate to perform them. Action by the Commission, it can be argued, should neither be performed by less than a majority of the Commissioners nor be passed down to personnel below the level of Commissioner.

If I have correctly sensed the basis of the proposed opposition, I should answer as follows:

First, I believe that men of the stature required to perform the functions entrusted to this Commission will necessarily be men who can be trusted to determine which of their functions they may properly delegate to others and which should be decided only at full Commission level. Delegation of matters which are minor in scope, but time-consuming in execution, will allow the Commission to concentrate its attention on the major problems facing this agency.

Second, under the Reorganization Plan the Commission will at all times retain the right to review any action delegated under the Plan. The Plan does not call for permanent irrevocable delegation of any Commission function. Upon the motion of any two Commissioners we may -- indeed we must -- consider the question at issue ourselves. If experience shows us that delegation in any particular area is ill conceived, we can at once abolish it and resume the practice of acting only at the Commission level.

I. The Reorganization Plan which we are to discuss today contemplates that the Commission, not the Chairman, may delegate to Commission personnel certain functions which are presently vested in the Commission itself. I endorse the principle of the Reorganization Plan which the President has proposed for our agency. Subject to the basic standards which the Congress established in the Administrative Procedure Act, the Plan would give our Commission broad authority to delegate to one or more of its members or to others within the agency certain of the functions which are currently performed only by the Commission itself. Action taken pursuant to any such delegation would be subject to a certiorari-like discretionary review by the full Commission, either upon the request of two or more Commissioners, of a party involved, or of an intervenor under appropriate rules to be fashioned by the Commission. The Plan also authorizes the Chairman to name the Commission personnel to perform the various functions delegated by the Commission.

II. As to the Resolution which has been submitted "That the Senate does not favor the Reorganization Plan Numbered 1," I would suppose that such opposition stems basically from the belief that functions assigned by law to a regulatory body such as ours should be performed by all of its

Indeed, I envision that we may well do considerable "cutting and trying" before we learn in what areas and to what extent we can best utilize the authority to delegate pursuant to this Plan. I assure you that we have no hard and fast notions on this subject. If the Plan becomes law we shall make every effort to use it as a vehicle to expedite the work of our agency only in those areas in which it is found to be appropriate. Should we encounter instances in which it is not working properly, we shall, of course, revoke or modify the delegation accordingly.

Third, I should also like to point out that the protections established by Congress in the Administrative Procedure Act for parties appearing before administrative agencies are unaffected by Reorganization Plan No. 1. Any delegation under the Reorganization Plan is expressly made subject to Section 7 of the Administrative Procedure Act. This requires that the Commission, a Commissioner or a hearing examiner shall preside at the taking of evidence in those cases where a Commission statute requires adjudication or rule making to be "determined on the record after opportunity for an agency hearing." I assume, moreover, that the limitations of Section 8 of the Administrative Procedure Act, which apply to cases where a hearing is required to be conducted in accordance with Section 7, are also applicable under the Plan. Therefore,

should the Reorganization Plan become effective, only the Commission, a Commissioner or a hearing examiner could preside over and issue the decision in a proceeding involving, for example, the revocation of registration of a broker-dealer. Finally, since there is nothing in Reorganization Plan No. 1 which expressly repeals or modifies any part of the Administrative Procedure Act, it would seem that the safeguards which Congress has placed in this Act would survive the effectiveness of Reorganization Plan No. 1 and continue to be applicable to parties who appear before the Securities and Exchange Commission.[1/]

III. In addition to the opposition to Reorganization Plan No. 1 apparently based upon the general inadvisability of delegation, specific criticisms have been raised concerning possible adverse effects which might result from the operation of the Plan. I should like at this point to attempt to answer some of these criticisms.

It has been suggested that the Plan will operate to deprive a party of the right to present its case to the full Commission. That, of course, is the purpose of the Plan -- to allow the Commission to delegate certain of its duties. However, as I have stated, the Plan contemplates that the Commission will always have a discretionary right of review and must

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1/ See Administrative Procedure Act Section 12

review upon the vote of two Commissioners. It seems extremely unlikely to me that the two necessary votes will not be obtained with respect to any matter of importance.

It has also been contended that Reorganization Plan No. 1 may deprive a Court of Appeals of the advice of the full Commission in the event that a delegated action is appealed directly to a court without having first gone before the Commission. This situation could possibly arise if the Commission delegated to a hearing examiner the right to make an initial decision on a particular matter and subsequently declined to review this matter. Should the Commission delegate the right to make an initial decision to a hearing examiner -- which it has never done, although authorized to do so by the Administrative Procedure Act -- I think it very improbable that the Commission would ever decline to hear the appeal of any party in a contested adversary proceeding. Moreover, even assuming that a case goes directly to the Court of Appeals without the benefit of a full Commission hearing, the Commission, as a party to the review proceeding, will be able to assist the court through its counsel.

Along the same lines as the last criticism, it has been suggested that, since under the Plan a staff decision could become final without review, the possibility exists for conflicting decisions to be passed on by

the courts without the Commission having had an opportunity to reconcile the conflict. I would say here, as I did in response to the previous criticism, that the likelihood of occurrence of such a situation is very slight. The Commission would certainly review a decision if it conflicted with either its own interpretation of the law or that of another staff member.

IV. I believe that it would be premature, and unwarranted, to give at this time a full list of the specific matters which the Commission will and will not delegate under the Reorganization Plan. As has been indicated, further study is needed before any firm conclusions can be reached. Furthermore, review of the actual operation of the Plan, if effective, will undoubtedly result in the reassumption of certain delegated functions and the delegation of others. However, at this time, the Commission has tentatively concluded that there are certain areas in which it should not delegate its authority, even though permissible under Reorganization Plan No. 1 or under its existing power to delegate, and others in which delegation would appear to be helpful and appropriate.

IV A. On the basis of our study to date, I would place at least the following items in the category of non-delegable responsibilities:

1. The general rule making powers of the Commission under the Acts which it administers. Under these statutes the Commission has the power to promulgate rules of general applicability which serve to implement or interpret the Acts it administers. As these rules involve basic policy considerations and are applicable in a general manner, it would not be advisable, and the Commission does not intend, to delegate its rule making power relative to policy matters. (Later I shall discuss a few instances in which the formulation of rules with respect to operating details might well be delegated.)

It should be noted in this connection that none of the Commission's broad rule making powers, though "rule making" under Section 4 of the Administrative Procedure Act, is subject to the exception in Reorganization Plan No. 1 concerning the applicability of Section 7 of the Administrative Procedure Act. As previously stated, Section 7 generally provides that only the Commission, a Commissioner, or a hearing examiner may act on a

particular matter. As provided by Section 4, Section 7 is operative only with respect to rule making where the Commission statute requires that rules be made "on the record after opportunity for an agency hearing." None of the Commission's general rule making powers has such a requirement.

However, I should like to point out that rule making by the Commission is subject to the general requirements of Section 4 of the Administrative Procedure Act. Sections 4(a) and 4(b) provide that, with certain exceptions, the Commission shall publish a general notice of proposed rule making in The Federal Register and also that the agency shall afford interested persons an opportunity to participate in rule making through submission of written data, views or arguments. It has been the Commission's policy in the past, and I may state it will continue to be its policy in the future, to provide opportunity for comment on proposed rules beyond the requirements of the Administrative Procedure Act. Such comments have been found to be most helpful. It should also be noted that

Section 4(d) of the Administrative Procedure Act provides another form of public participation in rule making by requiring that every agency shall accord any interested person the right to petition for the issuance, amendment or repeal of a rule.

Thus, assuming that the Commission delegated its rule making functions with respect to a particular area, the promulgation of rules in this area would undoubtedly be preceded by granting to interested parties an opportunity to comment on them. In the event that any party had objections to a rule, it seems clear to me that these objections would be brought to the attention of the Commission which would then reconsider the rule. Thus, should the Plan become effective, a form of review by the Commission would exist with respect to rule making.

As I have stated, it is not the Commission's intention to delegate its general rule making powers. In some cases, however, it may be appropriate to delegate to a Commissioner or a staff member the authority to issue rules in limited areas which do not deal with the basic

policies of the Acts. I might cite as an example the mechanical requirements dealing with registration statements, e.g., the number of copies to be filed. Examples of existing rules which might have been delegated include the following:

a. Rule 14a-6(h), Securities Exchange Act of 1934, and Rule 472(d), Securities Act of 1933, requiring marked copies of amendments to proxy material and registration statements.

b. Rules 402 and 403, Securities Act of 1933, dealing with the number of copies, binding, paper and printing of registration statements.

c. Rules 12b-11 through 12b-14, Securities Exchange Act of 1934, dealing generally with the mechanical requirements for forms filed under the Securities Exchange Act.

d. Rules 8b-11 and 8b-12, Investment Company Act of 1940, concerning the formal requirements of registration statements or reports filed under the Investment Company Act.

In summary, I do not believe that Reorganization Plan No. 1 presents any problems in allowing delegation of the Commission's rule making functions. In the first place, as stated, this Commission does not intend to delegate its rule making relative to policy matters. Moreover, the Administrative Procedure Act contemplates opportunity for public participation in rule making and the right to petition the Commission for amendment or repeal of a rule. Even in minor matters where rule making might be delegated, it is reasonable to assume that the Commission will be sensitive to public objections to a proposed rule and, accordingly, will re-examine the rule on its own motion.

2. Proposals for legislation which are deemed necessary or advisable from time to time in the public interest or in the interest of investors. Certainly the Commission alone, on behalf of the agency, should urge the adoption of legislation in the field of securities laws.

3. Referral of criminal reference reports to the Department of Justice and to the appropriate United States Attorney for prosecution for criminal violation of the securities laws. We referred over 100 criminal cases in the two-year period which ended June 30, 1960, but our Office of General Counsel screened these referrals with considerable care. The time which the Commission itself is required to devote to them is

suggest themselves as we continue our study of the possibilities under Reorganization Plan No. 1.

1. Orders for private investigations and in connection with them the use of the general subpoena power. This delegation appears to be appropriate only in more routine cases.

2. Ruling on applications under the Public Utility Holding Company Act of 1935 and the Investment Company Act of 1940 for exemptions from certain provisions of these Acts. Delegation would be appropriate in uncontested cases involving routine matters.

3. Institution of private broker-dealer proceedings. Delegation would be particularly proper where the violation alleged in the proceeding pertains to the Commission's net capital rule or bookkeeping requirements.

4. The qualification of trust indentures under the Trust Indenture Act of 1939 where the case is routine and uncontested.

5. Acceleration of effective date of listing of securities on an exchange pursuant to Section 12(d) of the Securities Exchange Act of 1934; applications for unlisted trading privileges on an exchange under Section 12(f) of the Securities Exchange Act of 1934; and applications for delisting of a

security from an exchange pursuant to Section 12(d) of the Securities Exchange Act of 1934.

6. Acceleration of the effective date of some registration statements under Section 8(a) of the Securities Act of 1933 upon examination by two Commissioners selected on a rotating basis. This burden is becoming so heavy that I doubt whether we can continue to meet it otherwise.

V. In connection with this discussion of appropriate areas of delegation, I should like to mention one aspect of Reorganization Plan No. 1 which I believe requires clarification. I refer to the interpretation of those parts of Sections 1(b) and 1(c) which read:

> "(b) With respect to the delegation of any of its functions, as provided in subsection (a) of this section, the Commission shall retain a discretionary right to review the action . . . upon its own initiative or upon petition of a party to or an intervenor in such actions, within such time and in such manner as the Commission shall by rule prescribe . . . (Underscoring added.)
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> "(c) Should the right to exercise such discretionary review be declined, or should no such review be sought within the time stated in the rules promulgated by the Commission, then the action of any such division. . . shall, for all purposes, including appeal or review thereof, be deemed the action of the Commission."

I believe proper interpretation of those clauses to be that our rules, promulgated pursuant to the Plan, may impose limitations on the right of parties to secure review of particular delegated actions. If such limitations are not imposed in appropriate cases, the absolute right to review on the part

of the person affected by a delegated action would make the delegation virtually meaningless.

By way of example, let us assume that the Commission should decide to delegate the power to institute certain minor administrative proceedings. If the subject of the delegated power could, upon petition to the Commission requesting review of the propriety of the institution of the proceeding, have the action stayed pending the outcome of the Commission decision whether to accept review, the value to the Commission of the power to delegate in these areas would at once be destroyed. Our only protection against such tactics would be to revert to our present practice of having all such matters authorized by the full Commission before any action is taken. Needless to say, the imposition of any limitations on appeal from delegated actions will be studied as carefully as the fact of delegation itself in order to insure that a right to immediate review will be available without limitation where appropriate.

It is my view that the language quoted above from Sections 1(b) and 1(c) of the proposed Plan is intended to give the Commission discretion to limit the right of review by such rules as are required to prevent the whole concept of delegation from being rendered meaningless. I hope that at some time during the course of this hearing your Committee may see fit to clarify any doubt which might exist as to the intent of this part of the proposed Reorganization Plan.

VI. In summary, I believe that the Plan, if effective, will serve, as the President stated in his message to Congress accompanying the Plan, to relieve the Commission from the necessity of dealing with many matters of lesser importance and thus conserve its time for the consideration of major matters of policy and planning. The rights of any party appearing before the Commission will continue to be protected by those procedural standards Congress established in the Administrative Procedure Act. Furthermore, the Commission will retain a right to review the correctness of any delegated action. The Plan also will operate to expand and clarify the Commission's already existing powers of delegation.

I do not want to create the impression that the Plan will resolve all the problems facing this Commission. A great burden of work falls upon the staff, and the agency backlog is due in large part to lack of personnel. Thus, for example, the processing of registration statements is performed at the staff level and the Plan will not expedite the execution of this responsibility. It will, however, lift some of the load off the Commission itself, free it from absorption with detail, and permit greater flexibility and opportunity to concentrate upon essentials.

I thank all of you for this opportunity to give you my views and for the careful consideration you are giving to the Reorganization Plan which the President has proposed for our agency.