"BOESKY DAY"
November 14, 1986[1]

Federal securities law enforcement entered the mainstream of public consciousness on November 14, 1986. On that day, the U.S. Securities and Exchange Commission and the United States Attorney's Office for the Southern District of New York announced the filing of federal civil and criminal securities fraud charges against Ivan F. Boesky. The government's case against Boesky arose out of a massive insider trading scheme in which Boesky earned tens of millions of dollars buying and selling stock on material nonpublic information concerning forthcoming corporate transactions. Rather than contest the charges, Boesky, without admitting or denying the Commission's allegations, elected to settle with the Commission. In the criminal case, Boesky admitted to certain facts and agreed to plead guilty to one count of conspiracy to commit securities fraud. He was later sentenced to three years in prison. As part of the settlement with the Commission, Boesky agreed to pay $100 million, $50 million of which was a civil penalty – it remains one of the largest civil fines ever imposed by the government on an individual. A key component of the settlement with the government was Boesky's agreement to cooperate in its ongoing investigations into insider trading and market manipulation. "Boesky Day," as it is called by some, was a defining moment in the history of federal securities law enforcement.

The Boesky case was the centerpiece of a series of insider trading investigations that began with the government's investigation of Dennis Levine in 1985 and ended with civil and criminal actions against Michael Milken, his firm, Drexel Burnham Lambert and others in the late 1980s and early 1990s. The 1980s and the insider trading investigations that dominated the headlines throughout the latter half of the decade thus mark an era of transformation in securities law enforcement. When the 1980's began, the economy was entering into a recession and securities law enforcement was in transition. The Commission's expansive enforcement program of the 1970s was giving way to a narrower, more prosecutorial approach in the 1980s. By 1983, the economy improved and merger and acquisition activity on Wall Street surged. Risk arbitrage, hostile takeovers, junk bond offerings and leveraged buyouts drove the markets. From a federal regulatory and law enforcement perspective, the increase in transactional activity offered opportunities for abuse. Insider trading became epidemic on Wall Street.

Shortly after becoming Chairman of the Commission in 1981, John Shad promised to crack down on insider trading with "hobnail boots." While the Commission had enjoyed some success in the early 1980s with high profile insider trading actions against Paul Thayer, the deputy Secretary of Defense, and R. Foster Winans, the Wall Street Journal reporter, it had also suffered judicial setbacks. The Supreme Court's decisions in United States v. Chiarella and SEC v. Dirks made it more difficult to prosecute insider trading. At a time when insider trading was becoming an enforcement

[1] Prepared by Daniel M. Hawke, Branch Chief, Division of Enforcement, U.S. Securities and Exchange Commission. The views expressed herein are those of the author and do not necessarily represent the views of the Commission or its staff or of the SEC Historical Society. The author wishes to acknowledge the assistance of Jonathan Katz, Leonard Wang and Shelley Grant.

priority for the Commission, the Commission's ability effectively to deal with it was encountering more challenges. Even when the Commission brought significant insider trading cases, as in the Thayer and Winans cases, the only available statutory remedy – injunctive relief – was widely regarded as weak and ineffective and provided little deterrent effect. While the Commission's common law right to ancillary relief in insider trading cases, such as disgorgement, had been well established in the 1960s and 1970s, the Commission had no statutory authority to seek civil penalties in those cases. To strengthen the Commission's hand, in 1984, Congress passed the Insider Trading Sanctions Act (ITSA), the first legislation to deal directly with the problem of insider trading. ITSA empowered the Commission to impose penalties up to three times profits made or losses avoided.

By 1985, Ivan Boesky had become a well recognized figure on Wall Street. A successful arbitrageur, he managed a multi-billion dollar portfolio. Over the years, Commission investigators had investigated Boesky, but had never charged him with securities law violations. In July 1985, however, the Commission opened an investigation based on a referral from a broker dealer concerning suspected insider trading by two employees in its Venezuelan office. Although the referral had no apparent connection to Boesky, it would set Commission investigators on a course that eventually would lead to Boesky.

The insider trading referral led Commission investigators to identify suspicious trading in accounts held at the Bahamian bank subsidiary of Bank Leu, a Swiss bank. Bahamian bank secrecy laws prevented the Commission from obtaining information about the accounts or the identity of who held them. Commission investigators had attempted to obtain bank records directly from the bank but were unsuccessful because the Commission had no established means to obtain documents or other information from a Bahamian bank.

In response to the Commission's investigation, Bank Leu hired U.S. counsel. Counsel requested a meeting with the Bank Leu portfolio manager who had been involved in the suspicious trading and offered to travel to the Bahamas for the meeting. However, the Bank Leu official traveled to New York, unaware that Commission investigators had placed a border watch on his name to be alerted if he entered the country. Informed by U.S. Customs that the official had entered the United States, Commission investigators were able to serve subpoenas upon him personally and as a representative of the bank. The Commission's subpoenas triggered a flurry of discussions between the Commission and the bank's counsel concerning the bank's response to the subpoenas. As a result of these discussions, the U.S. Attorney's Office and the SEC negotiated an agreement under which the bank would avoid prosecution if it identified to the U.S. government the holder of the accounts in which the suspicious trading had occurred, and if the bank disgorged approximately $1 million in trading profits that it and its employees had obtained by "following" the trades of the suspect account holder. Before the bank could disclose such information, the Bahamian banking authorities had to determine that compliance with the Commission's request would not violate Bahamian bank secrecy laws. Because the accounts at issue were securities

brokerage accounts and not banking accounts, the Bahamian authorities determined that disclosure of the holder's identity would not violate Bahamian law.

In May 1986, Bank Leu identified Dennis Levine, a rising star in New York investment banking circles, as the holder of the principal Bank Leu accounts in which the suspicious trading occurred. Shortly thereafter, based on the evidence developed following the disclosure of Levine's identity, the U.S. Attorney's Office obtained a warrant for Levine's arrest. On May 12, 1986, the Commission filed a civil action against Levine in the U.S. District Court in Manhattan, and the U.S. Attorney's Office had Levine arrested. While Levine's attorneys endeavored vigorously to contest the civil action, resorting, among other things, to deposing Leo Wang, who was a Commission attorney of record in the civil action, the weight of the evidence against Levine overwhelmed his attempts at defense. In June, following negotiations between the U.S. Attorney's Office, the Commission and Levine's counsel, Levine agreed to cooperate with the government.[2] In his debriefings, Levine told investigators that he had developed a business relationship with Boesky and had provided him with material nonpublic information concerning numerous transactions that Levine had worked on as an investment banker or about which he had received from a number of sources who were involved in the deals. Boesky, in return, agreed to pay Levine by sharing a percentage of the trading profits on the transactions for which Levine provided information.[3]

To corroborate Levine's story, the Commission sent subpoenas to Boesky. The subpoenas were drafted to signal that the Commission knew about Boesky's communications with Levine, and thereby suggest that the Commission could use Levine as a cooperating witness against Boesky. When his response to the Commission's subpoenas came due, Boesky and his lawyers faced a choice: Boesky could fight the government's investigation and risk becoming the target of the largest insider trading case in history or strike a deal, cooperate with the government and attempt to minimize the jail time and penalties that he would incur and the impact of the case on his family. After a period of intense and highly secret negotiations between Boesky's counsel and government investigators, Boesky elected to settle.

On September 17, 1986, Ivan Boesky entered into a settlement agreement with the Commission. To give the government time to debrief Boesky and enlist his assistance in its continuing investigation, the agreement was kept secret for a period of two months. Boesky's agreed-upon settlement with the Commission included the following: without admitting or denying the Commission's allegations, Boesky would consent to a final judgment permanently enjoining him from violating Sections 10(b) and 14(e) of the Securities Exchange Act of 1934 and Rules 10b-5 and 14e-3 thereunder, and ordering him to disgorge $50 million in ill-gotten trading profits and to pay a civil penalty of $50 million to the Treasury, for a total payment of $100 million. The judgment would provide that Boesky could satisfy his penalty payment by transferring assets (i.e., the

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[2] See SEC v. Dennis Levine et al., 35 S.E.C. Docket 898, Lit. Rel. No. 11095 (May 12, 1986).

[3] For details on the specific transactions as to which Levine provided Boesky with material nonpublic information and their compensation arrangements, see SEC v. Ivan F. Boesky, 37 S.E.C. Docket 66, Lit. Rel. No. 11288 (Nov. 14, 1986).

securities of entities that Boesky controlled or for which he served as a director) worth $50 million to the U.S Treasury. Boesky would also be given the opportunity to liquidate securities holdings in an investment fund that he managed while the settlement was still secret. He would also consent to a Commission order permanently barring him from associating with a broker dealer or other regulated entity in the securities industry.

For the criminal part of the settlement, Boesky agreed to plead guilty to one felony count of conspiracy to commit securities fraud. Sentencing was deferred pending Boesky's cooperation with the government. In order for the government to obtain the benefit of Boesky's cooperation, it was necessary that the settlement be kept secret so as not to alert those whom Boesky might implicate. Both sides thus became heavily invested in ensuring that Boesky fully cooperated in the government's investigation and that secrecy about the settlement was maintained.

To maintain the secrecy of the settlement, the parties made significant effort to ensure that only persons with the greatest need to know were informed of it. Time was also a factor. A publicly traded hotel company of which Boesky was a director faced a November 15 Commission filing deadline in which it would have to disclose that Boesky was under investigation. Throughout October and into November 1986, government lawyers debriefed Boesky about his dealings and co-conspirators. In order to maintain secrecy, these debriefings took place in the offices of Boesky's counsel, in a hotel and in a private residence. Boesky also assisted the government by making recorded telephone calls to those to whom he had passed or from whom he had received information and, in one instance, by wearing a government wire. As a result of his cooperation with the government, Boesky implicated Michael Milken, Drexel Burham Lambert and several others.

The government announced its settlement with Boesky on November 14, 1986. The terms of the settlement were unprecedented. To that point in time, no individual or entity in history had paid more money for violating the securities laws. Never before had securities fraud and the efforts of the federal government to combat wrongdoing on Wall Street garnered more public attention or interest. Although Boesky's cooperation had spared the government years of expense and enabled it to proceed with prosecutions of numerous other leading Wall Street figures, the settlement was sharply criticized soon after it was announced. The main criticism was that, despite disgorging what was then a record amount for insider trading and agreeing to pay the largest penalty in the Commission's history, Boesky had not paid enough. Others criticized the provision in the settlement that permitted Boesky to liquidate securities holdings in an investment fund that he managed while the settlement was still secret – which some characterized as a form of government sanctioned insider trading. These criticisms subsided as the magnitude of Boesky's cooperation became apparent from the government's continuing investigations.

On December 20, 1987, the U.S. District Court for the Southern District of New York sentenced Boesky to three years in prison. On March 24, 1988, Boesky entered the federal prison camp at Lompoc, California. He served approximately 19 months.[4]

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On September 13, 2004, some of the lawyers involved in the Boesky investigation, for the government and for the defense, gathered to conduct a group oral history. Although certain of them have spoken publicly from time to time about their experiences in the Boesky matter, this was the first time that they had convened as a group to recount their involvement in the events that resulted in "Boesky Day."

For the Securities and Exchange Commission

Gary Lynch

Gary Lynch joined the Division of Enforcement in 1976 as a staff attorney and worked his way up through the ranks to become Director of Enforcement in 1985. He served in that capacity until 1989 when he left to become a partner in Davis, Polk and Wardwell. He is currently the Executive Vice Chairman and General Counsel of Credit Suisse First Boston.

John Sturc

John Sturc joined the SEC Division of Enforcement in 1982 from the U.S. Attorney's Office for the District of Columbia. He served in the SEC's Division of Enforcement for eight years – six of those as Associate Director, the position that he held during the Levine and Boesky investigation. Mr. Sturc left the Commission in 1990 to become a partner in Gibson, Dunn & Crutcher, where he practices today.

Therese D. Pritchard

Terry Pritchard joined the SEC's Division of Enforcement in 1982. During the Boesky matter, Ms. Pritchard served as Assistant Director and continued in that position until she left the Commission in 1991. Currently, Ms. Pritchard is a partner in Bryan Cave LLP.

Leonard Wang

Leo Wang joined the SEC's Division of Enforcement in 1982. During the Levine and Boesky investigations, Mr. Wang served as a Branch Chief. He later became Assistant Director of Enforcement, the position he serves in today.

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[4] The U.S. Sentencing Guidelines were not applicable to his case.

Peter Y. Sonnenthal

Peter Sonnenthal was the SEC Division of Enforcement staff attorney responsible for investigating the Boesky matter. He served in the Division of Enforcement from 1984 to 1996, including service as a Special Assistant United States Attorney for the Southern District of New York from 1988 to 1989. Currently Mr. Sonnenthal manages personal property interests in Berlin, Germany.

For the U.S. Attorney's Office for the Southern District of New York

Charles M. Carberry

Mr. Carberry served as an Assistant U.S. Attorney for the Southern District of New York from 1979 to 1985. He served as Deputy Chief of the Criminal Division in 1985. In 1986, he became Chief of the Securities and Commodities Fraud Unit and served in that capacity during the Levine and Boesky cases. He left the U.S. Attorney's Office in 1987 to become a partner in Jones Day, where he practices in the area of business crime and civil litigation.

For Ivan Boesky

Harvey Pitt

Harvey Pitt served at the SEC from 1968-1978, including three years as Commission General Counsel, until he left to join Fried, Frank, Harris, Shriver & Jacobson. Mr. Pitt and his firm represented Bank Leu during the Levine investigation and Ivan Boesky in his corporate capacity in the matters that culminated in the settled civil and criminal actions against him. Mr. Pitt later became the 26th Chairman of the SEC. Currently, Mr. Pitt is the founder and Chief Executive Officer of Kalorama Partners.

Robert McCaw

Bob McCaw is a senior partner at Wilmer Cutler Pickering Hale & Dorr. Mr. McCaw and his firm served as counsel to Ivan Boesky in his personal capacity in the matters that culminated in the settled civil and criminal actions against him.

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Some of the information relied on in this forward came from the following sources:

SEC v. Ivan F. Boesky, 37 S.E.C. Docket 66, Lit. Rel. No. 11288 (Nov. 14, 1986)

In the Matter of Ivan F. Boesky, 38 S.E.C. Docket 464, Exch. Act Rel. 34-23802 (Nov. 14, 1986)

J. Stewart, Den of Thieves (1991)

D. Vise and S. Coll, Eagle on the Street (1991)

J. Seligman, The Transformation of Wall Street (3d ed. 2003)