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The SEC's Use of Rule 2(e) to Discipline Accountants and Other Professionals

Samuel H. Gruenbaum*

I. Introduction

Relying on its legislative, regulatory and enforcement authority, the Securities and Exchange Commission (SEC or Commission) has prominently influenced the accounting profession's responsibility for implementing the objectives of the federal securities laws. While the accountant of yesteryear may have been nothing more than a "watchdog," today's accountant shoulders a much greater responsibility. Although shareholder suits have contributed significantly to this trend, in large measure it has resulted from the persistent efforts of the SEC.

Much of the SEC's influence has been exerted through disciplinary proceedings under rule 2(e) of the Commission's Rules of Practice. Rule 2(e) has been an effective and intimidating tool for the SEC in policing accountants and their practices. Under the rule,

\[\text{the Commission may deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission . . . (i) not to possess the requisite qualifications to represent others, or (ii) to be lacking in character or integrity or to have engaged in unethical or improper professional conduct, or (iii) to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws . . . , or the rules and regulations thereunder.}\]

"Practicing before the Commission" is defined to include "the preparation of any statement, opinion or other paper by any . . . accountant . . . filed with the Commission . . . with the consent of such . . . accountant . . . ." The SEC's

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* Adjunct Professor of Law, Loyola Law School of Los Angeles; Associate, Loeb and Loeb; Member, California and District of Columbia Bars; Certified Public Accountant.

1 Derry v. Peek, 14 App. Cas. 337 (1889); see In re Kingston Cotton Mill Co., 2 Ch. 279 (1896).


3 17 C.F.R. § 201.2(e) (1980).

4 17 C.F.R. § 201.2(e)(1) (1980).

5 17 C.F.R. § 201.1(g) (1980). In SEC v. Ezrine, No. 72-3161 (S.D.N.Y. 1972), "practicing before the Commission" was defined more broadly by the court as participating, in a representative capacity, in any administrative proceeding, investigation, or conference concerning matters within the Commission's jurisdiction, (b) participating, in a representative capacity, in connection with matters within the Commission's jurisdiction when it appears or reasonably should appear that a Commission proceeding or investigation will be instituted therewith, (c) representing any broker or dealer, investment company or investment advisor registered or required to be registered with the Commission in connection with any matter arising under or relating to the federal securities laws, and (d) representing or advising
aggressive use of such proceedings in recent years has brought into focus several important issues regarding rule 2(e), some peculiar to accountants and others applicable to all professionals operating within the rule’s scope.

II. Rule 2(e) Authority and the Role of Accountants

Although rule 2(e) was initially adopted in 1935,7 its use by the Commission remained relatively restrained until the 1970’s.8 Since then, the rule’s increased use has provoked resistance and criticism from all sides,9 although the Commission thus far has been largely successful in meeting these challenges.

The most formidable challenge came in 1979 in Touche Ross & Co. v. SEC.10 Touche Ross, a national accounting firm and the target of a public 2(e) proceeding,11 argued that (1) the rule “had been promulgated ‘without any statutory authority’ ”; (2) the proceeding by the SEC had been instituted “without authority of law”; and (3) “in any event, since the SEC does not constitute an impartial forum for the adjudication of issues raised in the SEC’s Rule 2(e) order, that such administrative proceedings would deny Touche Ross due process of

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any entity or person in connection with the preparation or filing of documents as may be required to be filed with the Commission under the federal securities laws.


Orders of the SEC imposing sanctions under rule 2(e) are reviewable by direct appeal to the United States Court of Appeals for the District of Columbia or the court of appeals for the circuit in which the appellant resides or has his principal place of business. Securities Exchange Act of 1934, § 25(a), 15 U.S.C. § 78y(a) (1976) [hereinafter cited as Exchange Act].

6 See Gruenbaum & Steinberg, supra note 2, at 281-82 n.191; Downing & Miller, The Distortion and Misuse of Rule 2(e), 54 NOTRE DAME LAW. 774 (1979). See also Gruenbaum, Clients’ Frauds and Their Lawyers’ Obligations: A Response to Professor Kramer, 66 GEO. L.J. 191, 200-04 (1979).

7 SEC FIRST ANNUAL REP. 45 (1935). As initially adopted, the rule in effect established an SEC Bar by setting various admission requirements to practice before the Commission. These requirements were eliminated by the 1938 amendments to the rule. Securities Act Release No. 1761 (June 27, 1938). Subsequently, the rule was amended on two more occasions. See Securities Act Release No. 5088 (Sept. 24, 1970), [1970-1971 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 77,913; Securities Act Release No. 5147 (May 10, 1971), [1970-1971 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 78,064. In 1974 another amendment was proposed which would have made every rule 2(e) proceeding public unless otherwise directed by the Commission. Securities Act Release No. 5477 (Apr. 5, 1974), [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 79,738. However, the proposal was later withdrawn, Securities Act Release No. 5572 (Mar. 4, 1975), [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 80,533, and most rule 2(e) proceedings continue to remain nonpublic until finally adjudicated. See In re Touche Ross & Co., [1976-1977 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 80,720 (Sept. 2, 1976), for what appears to have been the first public rule 2(e) proceeding. Rule 2(e)(7) provides that all proceedings under the rule shall be nonpublic unless otherwise directed by the Commission. 17 C.F.R. § 201.2(e)(7)(1980).

8 See Gruenbaum & Steinberg, supra note 2, at 281-82 n.191 (accountants); In re Keating, Muething & Klekamp, [1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,124, at 81,994 (July 2, 1979) (Karmel, C., dissenting) (attorneys).

9 Former SEC Commissioner Roberta Karmel repeatedly criticized the Commission’s use of rule 2(e) as a vehicle for disciplining accountants and attorneys. See In re Nielsen, [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,446, at 82,883-86 (Jan. 10, 1980) (Karmel, C., dissenting) (accountants); In re Keating, Muething & Klekamp, [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,124, at 81,992-97 (July 2, 1979) (Karmel, C., dissenting) (attorneys). See also Fillis, Current Problems of Accountants’ Responsibilities to Third Parties, 28 VAND. L. REV. 31, 63-64 (1975) (the imposition of sanctions under rule 2(e) is an “inordinate intrusion of government into professional activity”); Downing & Miller, The Distortion and Misuse of Rule 2(e), 54 NOTRE DAME LAW. 774, 793 (1979) (“[t]he Commission’s questionable use, and abuse, of Rule 2(e) gives rise to serious considerations of the due process afforded the professional who is the subject of such a proceeding, and the larger question of the proper role of the SEC in disciplining and regulating professionals”); Bialkin, Commission’s Latest 2(e) Proceeding Profoundly Disquiets Securities Bar, NAT’L L.J., Apr. 30, 1979, at 25, col. 1; Comment, Attorney Liability Under SEC Rule 2(e): A New Standard?, 11 TEX. TECH. L. REV. 83 (1979).

Writing for the court, Judge Timbers, himself a former SEC General Counsel, rejected Touche Ross's arguments and held that the Commission had acted within its statutory authority in promulgating rule 2(e), and that disciplinary proceedings under the rule are a proper exercise of Commission power. As one of the bases for reaching these conclusions the court stated:

The role of the accounting and legal professions in implementing the objectives of the disclosure policy has increased in importance as the number and complexity of securities transactions has increased. By the very nature of its operations, the Commission, with its small staff and limited resources, cannot possibly examine, with the degree of close scrutiny required for full disclosure, each of the many financial statements which are filed. Recognizing this, the Commission necessarily must rely heavily on both the accounting and legal professions to perform their tasks diligently and responsibly. Breaches of professional responsibility jeopardize the achievement of the objectives of the securities laws and can inflict great damage on public investors.

This rationale and similar views have been articulated by the SEC to justify 2(e) proceedings against accountants and other professionals. Similarly, courts and commentators have often emphasized the importance of the accountant's role in safeguarding the interests of investors and maintaining the integrity of the disclosure process. As Judge Friendly noted, "[i]n our complex society the accountant's certificate and the lawyer's opinion can be instruments for inflicting pecuniary loss more potent than the chisel or the crowbar."

The prevalence of this attitude has helped maintain the frequency of administrative proceedings and private damage actions against accountants. Accountants, however, have achieved important victories in the battle to stem this onslaught. The resistance by the accounting profession is perhaps best demon-

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12 609 F.2d at 573.
13 Id. at 582. See Goldsmith v. Board of Tax Appeal, 270 U.S. 117, 122 (1926); SEC v. Caspo, 533 F.2d 7, 12 (D.C. Cir. 1976); Fields v. SEC, 495 F.2d 1075 (D.C. Cir. 1974); Kivitz v. SEC, 475 F.2d 956 (D.C. Cir. 1973); Schwebel v. Orrick, 153 F. Supp. 701, 704 (D.D.C. 1957), aff'd on other grounds, 251 F.2d 919 (D.C. Cir.), cert. denied, 256 U.S. 927 (1958); Herman v. Dulles, 265 F.2d 715 (D.C. Cir. 1953); cf. Koden v. Department of Justice, 564 F.2d 228, 234 (7th Cir. 1977) (Immigration and Naturalization Service has authority to discipline attorneys practicing or appearing before it).
Very little of a securities lawyer's work is adversary in character. He doesn't work in courtrooms where the pressure of vigilant adversaries and alert judges checks him. He works in his office where he prepares prospectuses, proxy statements, opinions of counsel, and other documents that we, our staff, the financial community, and the investing public must take on faith.

16 See authorities cited in note 15 supra; SEC v. Frank, 388 F.2d 486 (2d Cir. 1968); United States v. Benjamin, 328 F.2d 854 (2d Cir.), cert. denied, 377 U.S. 953 (1964); Gruenbaum & Steinberg, supra note 2.
17 United States v. Benjamin, 328 F.2d at 863.
18 As Judge Timbers recently stated in a case involving an accounting firm: "This is another in a series of cases which are occupying with increasing frequency the attention of the federal courts. They involve the responsibility of certified public accountants in preparing and certifying financial statements." Robertson v. Seidman & Siedman, [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,100, at 96,055 (2d Cir. 1979). See Gruenbaum & Steinberg, supra note 2, at 281-82 n.191.
19 See, e.g., Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) (no implied private right of action for damages under § 17(a) of the Exchange Act); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976); Oleck
strated by the Ninth Circuit's 1979 decision in *SEC v. Arthur Young & Co.*

In *Arthur Young & Co.*, the SEC alleged that a national accounting firm and certain of its individual members had violated the antifraud provisions of the securities acts in connection with the audits of various false and misleading financial statements. In arguing the standard by which liability should be judged, the SEC contended that the court should determine whether the financial statements in question, if properly audited, would have revealed to the ordinary prudent investor the present or future risks that his investment would bear. The court rejected this argument and instead adhered to the long settled practice of applying generally accepted standards established by the accounting profession.

The court stated that to accept the SEC's argument would render the accountant a guarantor of his client's honesty and a policeman for the SEC. Neither role, however, is within the proper function and responsibility of the accountant. "The difficulty with . . . [the SEC's position] is that Congress has not enacted the conscription bill that the SEC seeks to have us fashion and fix as an interpretive gloss on existing securities laws." Thus, while continuing to advocate the important role and responsibility of the accountant, courts have been mindful of the need to avoid serious impairment to the accounting profession. Justice Cardozo recognized this danger more than 50 years ago in a case where a non-client third party attempted to impose liability on an accounting firm for negligently certifying false and misleading financial statements:

If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences.

In a related area, courts in recent years have acknowledged the SEC's duty to proceed with restraint in its administrative proceedings. In his concurring opinion in *Touche Ross*, Judge Kaufman noted that courts will not tolerate excesses in such proceedings: "[I]n recognition that any power may be misused, dispassionate panels of Article III judges stand ready to correct the occasional excesses and errors that are an inevitable part of the administrative process." Other courts recently have not been reluctant to limit the parameters of SEC

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20 590 F.2d 785 (9th Cir. 1979).
21 Id. at 786.
22 Id. at 787-88.
23 Id. at 788.
24 Id.
25 Id.
26 Ultramares Corp. v. Touche, 255 N.Y. 170, 179-80, 174 N.E. 441, 444 (1931).
27 609 F.2d at 583 (Kaufman, J., concurring) (citing Buchman v. SEC, 553 F.2d 816, 820 (2d Cir. 1977); Kivitz v. SEC, 475 F.2d 956, 961 (D.C. Cir. 1973); Arthur Lipper Corp. v. SEC, 547 F.2d 171, 183-85 (2d Cir. 1976), cert. denied, 434 U.S. 1009 (1978)).
administrative proceedings, although many important questions remain unresolved.

III. Rule 2(e) Proceedings Against Entire Firms

A question which will undoubtedly soon receive increased judicial and administrative attention is whether the Commission may (or should) discipline an entire firm for the unlawful or improper conduct of only a few of its members. The courts have already sounded a warning in this area in SEC civil actions by questioning the appropriateness of enjoining an entire firm for the misconduct of a few of its members. Until recently at least, the Commission’s policy has been to hold an entire accounting firm responsible in rule 2(e) proceedings for certified financial statements based on an improper audit: “[W]e have consistently held that where . . . a firm of public accountants permits a report or certificate to be executed in its name, it will be held responsible therefor.”

The Commission is not insensitive to this issue, however, and appears to recognize that such a policy may have its limitations. In the 2(e) proceeding in which it announced the policy, the Commission also noted that the firm involved did not deny its responsibility for the alleged misconduct of the partners responsible for the questioned audits. The Commission therefore found no need to decide whether circumstances exist where it would be inappropriate to hold an entire firm responsible, and the Commission continues to discipline entire firms on the basis of its stated policy.

In a recent 2(e) proceeding against an accounting firm, the Commission, without expressly saying so, may have modified its policy. Specifically, it stated: “[T]he fact that a firm of public accountants permits a report or certificate to be executed in its name will be a factor in deciding whether to take action against the firm for the conduct of its partners and employees or for the deficiencies in the audit.” The Commission went on to rationalize holding the firm involved responsible since it viewed the misconduct as having been caused by the firm’s failure to adopt, implement and maintain a quality control system which would have ensured that its audits complied with generally accepted auditing standards. However, the Commission’s statement regarding firms’ responsibil-

31 In re Ernst & Ernst, Accounting Series Release No. 248, 6 FED. SEC. L. REP. (CCH) ¶ 72,270, at 62,738 n.68 (May 31, 1978).
32 Id.
35 Id. at 62,856 (emphasis added).
36 Id.
ity seems to be more than a restatement of existing policy: The policy appears to have been modified so that the rendering of a report or certified opinion in a firm's name will only be a factor in assessing whether the firm should be held responsible for the misconduct of its members. Thus far, however, the Commission has neither confirmed nor denied the policy's modification, nor articulated the "other factors" pertinent to the decision whether to hold a firm responsible. These other factors may be developed on an ad hoc basis.

The Commission's apparent modification of its policy most likely stems from doubts left by Touche Ross regarding the Commission's authority, and the proper use of its authority, to discipline a firm for the transgressions of a few of its members.37 The court in Touche Ross noted that an argument could be made that the Commission may not proceed against a firm "on a theory of respondeat superior without first establishing that Congress has delegated such authority and that the Commission has, through a rulemaking proceeding, set the standards for such an adjudication..."38 In his concurring opinion, Judge Kaufman suggested that sanctioning an entire firm for the transgressions of a few of its members could be "unjustifiably extensive in scope."39 Thus, the Second Circuit clearly warned the SEC about proceedings and sanctions against entire firms, and the Commission has apparently heeded the warning.

In a recent 2(e) proceeding against a law firm, the Commission carefully distinguished the proceeding from one where an entire firm was "being held accountable for knowledge or conduct of a few of its members."40 Instead, the Commission characterized the proceeding as one involving a firm whose members had various contacts with and knowledge of the transactions giving rise to the omitted disclosures under scrutiny, and which lacked an internal procedural mechanism for collecting information in the possession of firm members for purposes of preparing and reviewing public disclosure documents.41 Accordingly, the proceeding was based on the deficiencies in the firm rather than conduct of particular firm members. A dissenting commissioner, in addition to launching a wholesale attack on rule 2(e) and the Commission's authority under it,42 criticized the notion of holding an entire firm responsible for the improper professional conduct of its individual members43—a frequent basis for Commission proceedings against accounting firms.44 The dissent's supporting rationale was that "[e]thical and professional standards are peculiarly personal,"45 and there-
fore a firm should not be held responsible for violations of these standards by individual firm members.

It is increasingly apparent that numerous arguments exist against the use of 2(e) proceedings and sanctions against entire firms for the misconduct of individual firm members. Because image and reputation are so vitally important in the accounting profession, SEC disciplinary proceedings can have a serious negative impact on a firm's business. Consequently, the appropriateness of disciplining entire firms is a question that should, and presumably will, receive careful consideration.46

IV. Standard of Proof in Rule 2(e) Proceedings

Until the Supreme Court's 1981 decision in Steadman v. SEC,47 the lower federal courts had split on the proper standard of proof in SEC administrative proceedings.48 Some courts had held that a preponderance of the evidence standard applied, while others applied a clear and convincing proof standard.49

Historically, the Commission applied the preponderance standard and urged that it was appropriate in its administrative proceedings.50 Collins Securities Corp. v. SEC,51 in which the SEC sought disbarment from practice of a broker-dealer accused of fraud, appears to have been the first case in which a court addressed the appropriateness of this standard in SEC administrative proceedings. The court there concluded that a clear and convincing standard applied.52

In determining which standard should apply in Collins, the United States Court of Appeals for the District of Columbia Circuit looked to the nature of the alleged offense—fraud—and the type of sanctions sought.53 Noting the SEC's customary reliance on circumstantial proof to establish its cases, the seriousness of the charge of fraud and the penal nature of a sanction such as disbarment from practice, the court concluded that a clear and convincing standard should apply.

46 One effect which 2(e) proceedings against accounting firms have had is to subject the firms to a system of "peer review"—a process by which the firm's practices and procedures are reviewed by other members of the accounting profession. Accounting firms have frequently agreed to such reviews in settlement of 2(e) proceedings. See Gruenbaum & Steinberg, supra note 2, at 281-82 n.191.
48 Compare Collins Sec. Corp. v. SEC, 562 F.2d 820 (D.C. Cir. 1977) (clear and convincing standard applies when fraud allegations and disbarment of a professional from practice are at issue) and Whitney v. SEC, 604 F.2d 676 (D.C. Cir. 1979) (clear and convincing standard applies in case involving a nine month suspension of broker-dealer based on fraud) with Steadman v. SEC, 603 F.2d 1126 (5th Cir. 1979) (preponderance of the evidence standard applies in case involving fraud allegations and permanent disbarment from association with investment advisor), aff'd, 101 S. Ct. 999 (1981) and Investors Research Corp. v. SEC, 638 F.2d 168 (D.C. Cir.), cert. denied, 101 S. Ct. 317 (1980) (clear and convincing standard not applicable in administrative proceeding wherein finding of fraud was not required and no severe sanction was imposed). Cf. Charlton v. FTC, 543 F.2d 903 (D.C. Cir. 1976) (preponderance of the evidence rather than "substantial evidence" standard applies in FTC disciplinary proceeding against attorney); Sea Island Broadcasting Corp. v. FCC, 627 F.2d 240 (D.C. Cir.), cert. denied, 101 S.Ct. 105 (1980) (clear and convincing standard applies in certain FCC license revocation proceedings involving an issue of fraud).
49 See cases cited in note 48 supra.
51 562 F.2d 820 (D.C. Cir. 1977).
52 Id. at 826.
53 Id. at 824.
to provide a measure of protection for the accused.\textsuperscript{54} The court reached this conclusion despite the SEC's strenuous argument that broker-dealer administrative proceedings are remedial, not penal.\textsuperscript{55}

Collins expressly left open the question whether a lesser standard of proof would apply in proceedings other than those alleging fraud or resulting in the severe sanction of deprivation of livelihood.\textsuperscript{56} The same court partly answered this question in Whitney v. SEC,\textsuperscript{57} holding that "any sanction imposed under section 15(b) [administrative proceedings] which depends on a finding of fraud must be sustained by clear and convincing evidence."\textsuperscript{58} The court so concluded despite the lighter sanction imposed in Whitney—a nine month suspension of a broker-dealer—and the direct (as opposed to circumstantial) evidence present in the proceeding.\textsuperscript{59} Whitney did not, however, decide the other question left open in Collins—whether a lesser standard would apply in a proceeding imposing sanctions on the basis of conduct other than fraud.

In Investors Research Corp. v. SEC,\textsuperscript{60} the District of Columbia Circuit partly answered this question. Specifically, the court concluded that the "preponderance of the evidence" standard applied in SEC administrative proceedings not based on fraud and not seeking to impose severe sanctions.\textsuperscript{61} Still unclear, however, was whether the imposition of severe sanctions on the basis of conduct other than fraud would necessitate the higher standard of proof. Whitney decided that any sanction based on fraud dictated the higher standard, while Investors Research concluded that the lower standard applied where neither fraud nor severe sanctions were present. Accordingly, the question whether the higher standard would apply in a proceeding involving severe sanctions on the basis of conduct other than fraud was unanswered. Since proceedings against accountants frequently are based on improper professional conduct rather than fraud, this issue would have significant consequences for the accounting profession.\textsuperscript{62}

The importance of this question recently faded, however, when the Supreme Court finally resolved the standard of proof issue in Steadman v. SEC.\textsuperscript{63} The Fifth Circuit had held in Steadman that violations of the antifraud provisions of the securities laws may be proven by a preponderance of the evidence in SEC disciplinary proceedings.\textsuperscript{64} As a counterbalance to the harshness of adverse findings and sanctions in such proceedings, the court pointed to the power of the courts to set aside arbitrary and capricious SEC orders,\textsuperscript{65} and concluded that the more serious the sanction imposed by the Commission, the greater its obligation will be "to explain why a less drastic remedy would not suffice."\textsuperscript{66}

In concluding that a preponderance of the evidence standard applied, the
Supreme Court relied on the Administrative Procedure Act (the APA) rather than on the nature of the charges or the seriousness of the sanctions involved. The Court noted that while judicial review of SEC disciplinary proceedings is dealt with expressly in the securities laws, the standard of proof governing adjudications in such proceedings is not. Accordingly, the Court turned to the APA which "applies . . . in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," except in certain circumstances not relevant in Steadman. On the basis of the express language of the applicable provisions of the APA and the legislative history of these provisions, the Court concluded that the preponderance standard was appropriate.

It is important to note that the disciplinary proceeding involved in Steadman was brought pursuant to section 9(b) of the Investment Company Act (the ICA) and section 203(f) of the Investment Advisers Act, expressly empowering the Commission, in specified circumstances, to impose sanctions, after notice and opportunity for hearing, on certain persons associated with investment companies or investment advisers. The proceeding was not based on rule 2(e), which the Commission promulgated pursuant to its general rulemaking power rather than to any specific statutory authority. As discussed in the next section, an aspect of the court of appeals' decision in Steadman not considered by the Supreme Court may foreshadow a significant limitation on SEC proceedings against accountants and other professionals under rule 2(e).

V. Conduct Within Rule 2(e)

As noted earlier, the express language of rule 2(e) empowers the Commission to discipline an accountant or other professional, after notice and a hearing, on the basis of a finding that such person willfully violated or willfully aided and abetted violations of the federal securities laws. The rule further permits the Commission, without a hearing, to temporarily suspend a person from appearing or practicing before it if such person has been permanently enjoined in a Commission action from violating, or aiding and abetting violations of, the securities laws, or found by a court in a Commission action, or by the Commission in an administrative proceeding, to have violated or aided and abetted violations of the securities laws. If the person suspended does not petition the Commission for a hearing within thirty days to lift the suspension, it becomes permanent.

The Fifth Circuit's decision in Steadman, which was affirmed by the Supreme Court...
Court only on the question of the proper standard of proof, casts serious doubt on whether the Commission may proceed under rule 2(e) for violations of, or for the aiding and abetting of violations of, the securities laws. In *Steadman*, the Fifth Circuit was troubled by the Commission's position that it could consider violations of section 36(a) of the ICA, which does not expressly empower the Commission to proceed administratively, in assessing sanctions in an administrative proceeding expressly authorized by other statutory provisions. Unlike the two statutory provisions under which the Commission sought to impose the sanctions in *Steadman*—which, as stated earlier, expressly empower the Commission to administratively discipline certain persons associated with investment companies and investment advisers—section 36(a) of the ICA only authorizes the Commission to proceed in federal district court for violations of its provisions. As the Fifth Circuit noted, section 36(a) does not authorize administrative disciplinary proceedings: 

Section 36(a) permits the Commission to apply to a federal district court for an injunction against an officer of an investment adviser who has engaged or is about to engage in acts constituting "a breach of fiduciary duty involving personal misconduct." It gives no power to the Commission, an administrative agency, to adjudicate such breaches, and the Commission has held that it cannot do so. 

Since the jurisdictional provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 similarly limit to injunctive relief the Commiss-

76 101 S. Ct. at 1002-03.
77 603 F.2d at 1141.
78 See notes 71-72 and accompanying text supra.
79 Section 36(a) of the Investment Company Act provides:
   The Commission is authorized to bring an action in the proper district court of the United States, or in the United States court of any territory or other place subject to the jurisdiction of the United States, alleging that a person serving or acting in one or more of the following capacities has engaged within five years of the commencement of the action or is about to engage in any act or practice constituting a breach of fiduciary duty involving misconduct in respect of any registered investment company for which such person so serves or acts.
81 15 U.S.C. §§ 77a to 77bbb (1976). Section 20(b) of the Securities Act provides:
   Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this subchapter, or of any rule or regulation prescribed under authority thereof, it may in its discretion, bring an action in any district court of the United States or any other court subject to the jurisdiction of the United States, enjoining such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the necessary criminal proceedings under this subchapter.
   Any such criminal proceeding may be brought either in the district wherein the transmission of the prospectus or security complained of begins, or in the district wherein such prospectus or security is received.
   The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability
sion's authority to redress violations of their provisions, it is arguable after Steadman that the Commission may not proceed administratively against accountants or other professionals under rule 2(e) for violations of the securities acts despite the rule's express language. The limitation on 2(e) implied by Steadman seems more plausible in light of the numerous provisions in the securities acts expressly providing for administrative proceedings under various circumstances, none of which expressly deals with violations committed by accountants or other professionals while providing their services. Following the court of appeals' logic in Steadman, the Commission should not be able to proceed under rule 2(e) for violations of the securities laws since the "responsibility for . . . [their] enforcement is vested in the courts, not the Commission."85

A similar argument was advanced by former SEC Commissioner Karmel in 1979 in a rule 2(e) proceeding against a law firm. Arguing that the securities laws do not expressly grant the Commission authority to discipline attorneys, Commissioner Karmel objected to using rule 2(e) to discipline attorneys for any purpose other than protecting the integrity or processes of the Commission. Acknowledging that a government agency may have the need to discipline professionals practicing before it "in order to keep its proceedings orderly and dignified," Commissioner Karmel nevertheless was highly critical of using an implied power such as rule 2(e) for any other purpose. Thus, in her view, any sanctions which the Commission believes are appropriate to protect itself and the public from conduct of professionals which does not directly interfere with the

or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291 and 1292 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts.


83 See 603 F.2d at 1141 n.21, where the Fifth Circuit referred to any attempt by the Commission to proceed administratively on the basis of violations of § 36(a) as a poaching "on the jurisdiction entrusted solely to a federal district court."


85 603 F.2d at 1142 (referring to § 36(a) of the ICA).

86 In re Keating, Muething & Klakamp, [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,124 (July 2, 1979) (Karmel, C., dissenting).

87 Id. at 81,994.

88 Id.
Commission's integrity or processes should be sought in federal court, not in rule 2(e) proceedings. 89

While Commissioner Karmel expressed the belief that the Commission might have broader disciplinary authority over accountants because of its express statutory authority to regulate financial statement presentation and independence requirements of accountants, 90 she echoed the same concerns about proceedings against accountants where the alleged misconduct does not directly interfere with the Commission's integrity or processes. 91 In a 1980 rule 2(e) proceeding against an accountant, Commissioner Karmel stated: "In my opinion, some direct connection between the accountant's improper conduct and the Commission's express regulatory authority must be demonstrated before an implied statutory sanction like Rule 2(e) can be invoked with respect to an accountant." 92 According to Commissioner Karmel, the Commission does not, however, have the statutory authority to discipline an accountant solely because he has violated the securities laws. 93

Although this view may be appealing, it is not without opposition both from within the Commission and in the courts. In the same rule 2(e) proceeding in which Commissioner Karmel launched her attack on the rule, then Chairman Williams wrote a concurring opinion in an attempt to soften Commissioner Karmel's strongly worded dissent. 94 Specifically, Chairman Williams stated that the Commission had both the inherent and statutory authority to promulgate the rule. 95 Moreover, the rule was designed and is used "to protect the integrity of [the Commission's] processes from incompetent, unethical or dishonest professionals." 96

Buttressing his arguments, Chairman Williams pointed to the Second Circuit's 1979 decision in Touche Ross & Co. v. SEC 97 which sustained the validity of the rule and the Commission's authority to promulgate it. 98 In Touche Ross, the court expressly rejected the argument that through use of the rule the Commission is "attempting to usurp the jurisdiction of the federal courts to deal with 'violations' of the securities laws." 99 Instead, the court viewed the Commission's

89 Id. at 81,996-97; See In re Nielsen, [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,446, at 82,886 (Jan. 10, 1980).
90 In re Keating, Muething & Klekamp, [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,124, at 81,993 (July 2, 1979) (Karmel, C., dissenting); In re Nielsen, [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,446, at 82,884 (Jan. 10, 1980) (Karmel, C., dissenting).
91 Id. at 82,886.
92 Id. at 82,885.
93 Id.
94 In re Keating, Muething & Klekamp, [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,124, at 81,989 (July 2, 1979) (Williams, C., concurring specially).
95 As Chairman Williams stated:

The rule was promulgated not only pursuant to the Commission's inherent authority, but as an exercise of the broad, express rulemaking power which Congress, in reliance upon the ability of an expert agency to fashion necessary or appropriate regulations in a complex and rapidly changing area, conferred in Section 23(a) of the Securities Exchange Act. Since that time, the Commission has periodically amended and reexamined the rule, repeatedly confirming its belief in the rule's legitimacy. Moreover, the Commission has brought over 100 proceedings against accountants since the inception of the rule.

Id. at 81,990 (footnote omitted).
96 Id.
97 609 F.2d 570 (2d Cir. 1979).
98 Id. at 582.
99 Id. at 579.
use of the rule as an attempt "to preserve the integrity of its own procedures, by assuring the fitness of those professionals who represent others before the Commission." Such reasoning could overcome the limitation on SEC administrative proceedings suggested by the court in Steadman.

Interestingly, in reaching its conclusion about the Commission's use of rule 2(e), the Second Circuit pointed to the Commission's admitted policy of using the rule as a means of determining professional qualifications, not as an additional weapon in its enforcement arsenal. Although determining professional qualifications certainly could be construed to include examining conduct which violates the federal securities laws, it is also susceptible to a narrower construction, especially in the context in which it was used. Thus, whether the Second Circuit's decision in Touche Ross rebuts the limitation suggested by the Fifth Circuit in Steadman is open to debate.

At this stage, serious questions have been raised by the courts and members of the Commission regarding the scope of the Commission's authority under rule 2(e). Apparently, resolution will come not from express statutory language or congressional history, but from a policy decision by the courts.

VI. Culpability Standards in Rule 2(e) Proceedings

At least two of the express bases upon which the Commission may discipline professionals under rule 2(e) involve the issue of the state of mind necessary to establish violations of the rule. "Unethical or improper professional conduct," or willful violations or the willful aiding and abetting of violations of the federal securities laws, may support temporarily or permanently suspending a professional from practicing or appearing before the Commission. The language of these provisions raises several questions regarding the applicable culpability standards. The controversial 2(e) proceeding in In re Carter & Johnson recently addressed some of these questions.

In Carter & Johnson, an administrative law judge (ALJ) found that two lawyers associated with the same law firm had, in their representation of a reporting company client, violated the federal securities laws and engaged in unethical and improper professional conduct in connection with the preparation of allegedly false and misleading letters to stockholders, a press release, and an 8-K Report filed with the SEC. The ALJ held that the lawyers both willfully violated and aided and abetted violations of the antifraud and reporting provisions of the

100 Id.
101 Id. The court cited Securities Act Release No. 5088 (Sept. 24, 1970), supra note 74, where the Commission explained the 1970 amendment to the rule, see note 7 supra, as follows:

The latter aspect of the revision is merely a clarification of Commission practice under the present Rule 2(e), which provides for the disqualification from appearance or practice before the Commission of any person who the Commission finds after notice of and opportunity for hearing (i) not to possess the requisite qualifications to represent others, or (ii) to be lacking in character or integrity or to have engaged in unethical or improper professional conduct.

102 See notes 3-4 and accompanying text supra.
103 17 C.F.R. § 201.2(e)(1) (1980).
105 Interestingly, the Commission did not proceed against the entire law firm for the alleged misconduct of the two individual partners. See notes 29-46 and accompanying text supra.
Exchange Act.\textsuperscript{107} No findings were made regarding the lawyers' states of mind in engaging in unethical and improper professional conduct. The lawyers appealed the ALJ's decision to the Commission which reversed on all counts.\textsuperscript{108}

The Commission summarily reversed the ALJ's findings of primary securities law violations on the grounds that (1) the lawyers were not "issuers" and therefore could not have directly violated the reporting provision allegedly violated (which applies to issuers), and (2) the lawyers' involvement in the decision-making processes of the reporting company client was insufficient to justify a finding that they had directly violated the antifraud provisions.\textsuperscript{109} The Commission also reversed the ALJ's findings regarding aiding and abetting. It found insufficient evidence to establish that the respondents had acted with sufficient knowledge and awareness or recklessness to satisfy the test for willful aiding and abetting.\textsuperscript{110}

In reversing the ALJ on the aiding and abetting charge, the Commission engaged in a lengthy discussion concerning the state of mind necessary to establish aiding and abetting liability in rule 2(e) proceedings.\textsuperscript{111} Although it is not absolutely clear from the opinion, the Commission appears to have adopted the standards applicable in civil securities cases.\textsuperscript{112} This marks, or at least suggests, a departure from past SEC pronouncements regarding culpability, since the Commission earlier expressly rejected the applicability of the civil culpability standards in its administrative proceedings.

In \textit{Arthur Lipper Corp. v. SEC},\textsuperscript{113} the Commission argued that the scienter requirement established by the Supreme Court in \textit{Ernst & Ernst v. Hochfelder}\textsuperscript{114} for private damage actions under section 10(b) and rule 10b-5 of the Exchange Act does not apply in SEC administrative proceedings brought under section 15 of

\begin{itemize}
\item \textsuperscript{107} The lawyers were found to have violated §§ 10(b) and 13(a) of the Exchange Act and rules 10b-5, 12b-20 and 13a-11 thereunder. [1979 Transfer Binder] \textsc{fed. sec. l. rep. (cch)} \textsuperscript{182,175 at 82,180.}
\item \textsuperscript{108} \textit{In re Carter & Johnson}, [\textit{Current}] \textsc{fed. sec. l. rep. (cch)} \textsuperscript{182,847 at 84,145 (Feb. 28, 1981).}
\item \textsuperscript{109} \textit{Id. at 84,163.}
\item \textsuperscript{110} \textit{Id. at 84,165-67.} The ALJ's findings regarding unethical and improper professional conduct were reversed on the grounds that generally accepted standards of professional conduct had not been adopted or endorsed by the Commission or unambiguously developed during the period of the lawyers' activities. \textit{Id. at 84,173.} The Commission continued, for purpose of future cases, to give its interpretation of "unethical or improper professional conduct" under rule 2(e), and added that it intended to solicit public comment on that interpretation. \textit{Id. at 84,169-73.}
\item \textsuperscript{111} \textit{Id. at 84,165-69.} On the basis of its review of existing case law dealing with civil suits under the securities acts, the Commission, in its discussion of aiding and abetting under § 10(b), found the following to be the necessary elements to establish aiding and abetting liability:
\begin{enumerate}
\item there exists an independent securities law violation committed by some other party;
\item the aider and abettor knowingly and substantially assisted the conduct that constitutes the violation; and
\item the aider and abettor was aware or knew that his role was part of an activity that was improper or illegal.
\end{enumerate}
\item \textsuperscript{112} See cases cited in note 111 supra.
\item \textsuperscript{113} 547 F.2d 171 (2d Cir. 1976), \textit{cert. denied}, 434 U.S. 1009 (1978).
\item \textsuperscript{114} 425 U.S. 185 (1976).
the Exchange Act charging fraud against broker-dealers.\textsuperscript{115} In \textit{Hochfelder}, the Court defined scienter as "a mental state embracing intent to deceive, manipulate, or defraud."\textsuperscript{116} In \textit{Arthur Lipper Corp.}, however, the Commission argued against imposing this culpability standard in its administrative proceedings.\textsuperscript{117} According to the Commission, the state of mind requirement in such proceedings is governed by the term "willfully" as used in section 15 of the Exchange Act, and presumably also as used in rule 2(e),\textsuperscript{118} and this term simply requires proof that the respondent acted with awareness of the consequences of his conduct.\textsuperscript{119} This standard seems only to require a conscious awareness of one's actions, while the \textit{Hochfelder} standard—which embraces an intent to deceive, manipulate or defraud—seems to require some element of evil or wrongful intent.\textsuperscript{120} Obviously, the Commission's interpretation of "willful" in the context of its administrative proceedings is less stringent than the Supreme Court's interpretation of "scienter" in the context of civil damage actions. The issue in either case, however, is the same: Did the respondent or defendant violate or aid and abet violations of the anti-fraud provisions of the securities laws? The court of appeals in \textit{Arthur Lipper Corp.} did not reach a conclusion on the issue.\textsuperscript{121}

In \textit{Carter & Johnson}, the ALJ applied the Commission's interpretation of "willfulness" in determining whether the accused lawyers violated or aided and abetted violations of section 10(b) of the Exchange Act.\textsuperscript{122} In doing so, the ALJ noted that "the Commission has held \textit{Hochfelder} to be inapplicable to its administrative proceedings."\textsuperscript{123} In reversing the ALJ, however, the Commission made no reference to its prior pronouncements or the ALJ's adoption of the willfulness standard in administrative proceedings. Instead, the Commission eliminated the need to consider this issue by finding insufficient evidence to establish the required knowledge and awareness necessary for secondary liability under section

\textsuperscript{115} 547 F.2d at 180.
\textsuperscript{116} 425 U.S. at 193-94 n.12.
\textsuperscript{117} 547 F.2d at 180; see Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965).
\textsuperscript{118} \textit{See} text accompanying notes 3-4 supra.
\textsuperscript{119} 547 F.2d at 180. The court in \textit{Arthur Lipper} noted that this interpretation of the "willfulness" requirement "has been accorded judicial acceptance." \textit{Id.} at 180 ("It has been uniformly held that 'willfully' in this context means intentionally committing the act which constitutes the violation. There is no requirement that the actor also be aware that he is violating one of the Rules or Acts.") (footnote omitted) (citing Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965)).
\textsuperscript{120} \textit{See} Steinberg & Gruenbaum, \textit{Variations of "Recklessness" After Hochfelder and Aaron}, 8 SEC. REG. L.J. 179, 191-94 (1980).
\textsuperscript{121} The court stated:

\begin{quote}
The Court left open [in Hochfelder] "the question whether scienter is a necessary element in an action for injunctive relief under § 10(b) and Rule 10b-5." 425 U.S. at 194 n.12, 96 S. Ct. at 1381. The Court said nothing about whether scienter is a necessary element in disciplinary actions under § 15 [against broker-dealers in securities]. These actions share with damage suits the quality of visiting serious consequences on past conduct, even though they also have a remedial effect. They thus differ from injunctive proceedings, the objective of which is solely to prevent threatened future harm, although unlawful conduct is necessary—if not always sufficient—to demonstrate the reality of that threat. We therefore assume, \textit{arguendo}, without deciding, that the Hochfelder culpability standard applies in disciplinary proceedings.
\end{quote}

547 F.2d at 180-81 n.6.

\textsuperscript{122} [1979 Transfer Binder] 
\textit{Fed. Sec. L. Rep.} (CCH) \# 82,175, at 82,180 (Mar. 7, 1979), \textit{rev'd}, [Current] 

\textit{Fed. Sec. L. Rep.} (CCH) \# 81,243; and Arthur Lipper Corp. v. SEC, 547 F.2d 171, 180 (2d Cir. 1976), \textit{cert. denied}, 434 U.S. 1009 (1978)).
Since much of the Commission's *Carter & Johnson* opinion suggests, perhaps somewhat obliquely, that the *Hochfelder* scienter requirement should apply in SEC administrative proceedings, further examination of the issue seems likely. In addition, although no court has yet decided the issue, the judicial precedents suggest the *Hochfelder* requirement applies in administrative proceedings.\(^{125}\)

In reversing the ALJ on the aiding and abetting charge, the Commission stated: "[W]e do hold, however, that a finding of *willful* aiding and abetting within the meaning of Rule 2(e)(1)(iii) requires a showing that respondents were aware or knew that their role was part of an activity that was improper or illegal."\(^{126}\) One element required to establish aiding and abetting liability is a "wrongful intent" on the part of the respondent.\(^{127}\) In addition, the Commission stated that in aiding and abetting proceedings involving active participation by the respondent in conduct furthering the primary violation, the evidence must establish that the "respondent acted with sufficient knowledge and awareness or recklessness to satisfy the test for willful aiding and abetting liability."\(^{128}\) To establish aiding and abetting liability in cases involving silence or inaction rather than active conduct, the respondent must be found to have "consciously intended to assist . . . the primary violation, or . . . [to have] breached a duty to disclose or act and had some degree of scienter."\(^{129}\) This "test requires a showing that . . . [the respondent] 'intended' to foster the illegal activity."\(^{130}\)

Each of the Commission's references to state of mind resembled scienter as defined in *Hochfelder*. Mere awareness of the act done, the standard previously advocated by the Commission,\(^{131}\) would appear insufficient in light of the standards articulated in *Carter & Johnson*. Whether the Commission will adhere to these standards in future cases, however, is subject to some doubt.\(^{132}\)

124 See notes 110-111 and accompanying text supra.
125 See notes 132-142 and accompanying text infra.
126 In re *Carter & Johnson*, [Current] FED. SEC. L. REP. (CCH) ¶ 82,847 at 84,167.
127 Id.
128 Id.
129 Id. at 84,169.
130 Id.
131 See notes 115-123 and accompanying text supra.
132 On March 20, 1981, the staff of the SEC filed a Motion for Reconsideration and Clarification with the Commission with respect to various aspects of the *Carter & Johnson* decision dealing with the state of mind requirement. See SEC Administrative Proc. File No. 3-5464 (Mar. 20, 1981). Several of the staff's suggested clarifications and modifications would restrict the Commission's broad language concerning state of mind.

In addition, it bears emphasis that the Commission's discussion of the state of mind required was limited to aiding and abetting liability under § 10(b) of the Exchange Act and rule 10b-5. The *Carter & Johnson* decision did not address this issue in the context of § 17(a) of the Securities Act. See Aaron v. SEC, 446 U.S. 680, 697 (1980) (scienter required under § 17(a)(1) but not §§ 17(a)(2) and 17(a)(3) of the Securities Act in SEC injunctive suits). Also, the Commission or its staff may argue that the state of mind standards articulated in *Carter & Johnson* only apply in § 10(b) aiding and abetting proceedings, where the respondent, being somewhat removed from the primary violation, must be shown to have intentionally assisted or furthered the primary wrong in some manner, and that such intent is not necessary where the respondent is himself charged with a primary violation. While there may be circumstances where such a distinction has appeal, it seems axiomatic that if the primary violator must have acted with scienter to be liable under § 10(b), so too must have the aider and abettor. Of course in some respects this begs the argument made by the Commission about its interpretation of "willfulness" in the context of administrative proceedings. See notes 115-124 and accompanying text supra. Nonetheless, as discussed in the text infra, it is unlikely that the courts would distinguish between the culpability standard applicable in administrative proceedings and civil suits since the statutory language and apparent congressional intent of § 10(b) dictate the scienter requirement, and thus the forum in which the violation is claimed should have
Judicial precedents suggest that the Commission should abide by the standards applicable in civil suits. The Supreme Court's decision in *Hochfelder* that scienter must be proved in private damage actions under section 10(b) was based not on the policy objectives to be achieved by enforcement of the statute, but instead on the section's language and apparent congressional intent.\(^3\) Similarly, the Court's more recent decision in *Aaron v. SEC*,\(^3\) in which proof of scienter was held to be required in SEC injunctive suits brought under section 10(b),\(^3\) was buttressed by the same analysis of express statutory language and apparent congressional intent.\(^3\) Thus, in analyzing section 10(b)'s culpability requirement the Court was indifferent to whether the plaintiff was the SEC or a private litigant or whether injunctive or monetary relief was sought. Instead, the crucial inquiry concerned statutory language and congressional intent.

Under the *Hochfelder* and *Aaron* analysis, it is doubtful that the Commission would prevail in arguing that a lesser requirement applies in rule 2(e) or other SEC administrative proceedings alleging section 10(b) violations.\(^13\) Instead, the language of section 10(b), which itself dictates a scienter requirement, would be controlling. For example, the Commission argued before the court of appeals in *Steadman v. SEC*\(^3\) that proof of scienter was not required in administrative proceedings brought under section 17(a)(1) of the Securities Act.\(^3\) The Fifth Circuit rejected this argument, holding that on the basis of that section's language and the analytical approach mandated by *Hochfelder*, scienter was a necessary element of a section 17(a)(1) violation in SEC administrative proceedings.\(^14\) Neither the forum in which the charges were brought nor the severity of the sanctions sought made a difference to the Fifth Circuit in deciding the basic elements of a violation of the statute.\(^14\) Rather, the language of the statute controlled. Other courts that have commented on the issue have shown a similar inclination.\(^14\) Thus, it is entirely likely that the Commission will be required to

\(\text{\textsuperscript{13}}\) Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976).

\(\text{\textsuperscript{14}}\) 603 F.2d 1126 (5th Cir. 1979). See notes 63-85 and accompanying text supra.

\(\text{\textsuperscript{15}}\) 603 F.2d at 1131-33. Subsequently, the Supreme Court decided that scienter was required in SEC injunctive suits brought under *§ 13(a)(1)* of the Securities Act, but not under *§§ 17(a)(2) and 17(a)(3)*. *Aaron v. SEC*, 446 U.S. 680, 697 (1980).

\(\text{\textsuperscript{16}}\) 603 F.2d at 1133. This aspect of *Steadman* was not reviewed by the Supreme Court. See notes 63-85 and accompanying text supra.

\(\text{\textsuperscript{17}}\) 603 F.2d at 1133.
adopt the scienter requirement in its administrative proceedings.

Conclusion

The SEC’s aggressive use of rule 2(e) proceedings against accountants and other professionals in recent years has brought into focus several important issues concerning such proceedings. Although the Commission has been successful in dealing with some of these issues, it is evident that the breadth of SEC administrative proceedings and the latitude with which the Commission may proceed under them are being narrowed. Consequently, the Commission’s ability to discipline members of the accounting and other professions in the future may well be curtailed.

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