H.R. 658—THE ACCOUNTANT, COMPLIANCE, AND ENFORCEMENT STAFFING ACT OF 2003
AND
H.R. 957—THE BROKER ACCOUNTABILITY THROUGH ENHANCED TRANSPARENCY ACT OF 2003

HEARING

BEFORE THE

SUBCOMMITTEE ON
CAPITAL MARKETS, INSURANCE, AND
GOVERNMENT SPONSORED ENTERPRISES

OF THE

COMMITTEE ON
FINANCIAL SERVICES

U.S. HOUSE OF REPRESENTATIVES

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WITNESSES

THURSDAY, MARCH 6, 2003

APPENDIX

H.R. 658—The Accountant, Compliance, And Enforcement Staffing Act of 2003
And
H.R. 957—The Broker Accountability Through Enhanced Transparency Act of 2003

Thursday, March 6, 2003

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CAPITAL MARKETS, INSURANCE, AND GOVERNMENT SPONSORED ENTERPRISES
COMMITTEE ON FINANCIAL SERVICES,
Washington, D.C.

The subcommittee met, pursuant to call, at 10:05 a.m., in Room 2128, Rayburn House Office Building, Hon. Richard Baker [chairman of the subcommittee] presiding.

Present: Representatives Baker, Kelly, Ryun, Hart, Tiberi, Harris, Renzi, Kanjorski, Sherman, Meeks, Inslee, Moore, Lucas, Israel, McCarthy, Matheson, Lynch, Miller, Emanuel and Scott.

Chairman BAKER. [Presiding.] I would like to call the meeting of the Capital Markets Subcommittee to order. Today, our purpose is to receive testimony with regard to two legislative provisions, H.R. 658, the Accountant Compliance and Enforcement Staffing Act of 2003, and on our second panel, H.R. 957, the Broker Accountability Through Enhanced Transparency Act of 2003.

With regard to the former, it is clear that the SEC resources have been limited and the ability to engage appropriate levels of technical assistance in the complex securities world we find ourselves in is of extreme concern to all members. The question before us today is the appropriate mechanism by which we can secure professional staff to engage in the many new requirements recently adopted by the Congress pursuant to many of the identified problems in the performance of the markets.

It is my belief that some immediate action should be taken to provide needed resources. It will be difficult to instill a high level of confidence in consumers, and therefore have them return to the investing market, without the assurance that the SEC has the strength, ability, and capacity to ferret out wrongdoing and provide remedies for those investors who feel they have not been professionally treated.

In addition to that legislation, H.R. 957, is legislation which the NASD and others have expressed interest in, to enable a clearer and sharper picture to be drawn about activities in the market-

place legislation which I also believe to be of value in providing for enhanced investor confidence.

I am looking forward to hearing the witnesses. I believe we have good testimony, and I believe this will be helpful to the members in making determinations about action that should be taken with regard to both matters.

At this time, I recognize Mr. Kanjorski for any opening statement he chooses to make.

Mr. KANJORSKI. Mr. Chairman, thank you for the opportunity to offer my initial thoughts about H.R. 658 and H.R. 957 before we hear from each of our witnesses. As you know, Mr. Chairman, I have made investor protection one of my top priorities for work on this committee. As a result, I have regularly supported sensible and well-crafted legislative initiatives designed to advance this goal.

During the last year, and only after a series of large-scale corporate scandals, many of my colleagues finally joined me in recognizing the importance of maintaining a strong federal regulator to protect the interests of American investors. Accordingly, we have significantly augmented the resources available to the Securities and Exchange Commission, including increasing the agency's budget by more than $270 million, thus allowing it to hire more than 800 new employees.

Unfortunately, the SEC has encountered some difficulties in identifying and hiring the best workers for these new positions, particularly in a number of specialized professional fields. Accordingly, H.R. 658, the Accountant Compliance and Enforcement Staffing Act, would seek to streamline the hiring process for accountants, competent examiners and economists that the SEC uses, similar to the rules all government agencies use to recruit and hire attorneys. Former SEC Chairman Harvey Pitt suggested this accelerated hiring process for these professionals earlier this year in a letter to the Congress.

We will also hear from a witness later today about H.R. 957, the Broker Accountability Through Enhanced Transparency Act. This bill seeks to provide investors with easy online access to critical information about securities firms and their brokers. These disclosures would include information on regulatory investigations, disciplinary actions, legal proceedings and customer complaints. The bill also will give the National Association of Securities Dealers certain legal protections for providing this information over the Internet.

Since Congress required the NASD in 1990 to make such information available to individual investors without charge, this disclosure program has become increasingly popular. Today, the NASD maintains information on more than 665,000 registered security employees in this automated electronic system, and in 2002 investors made 2.5 million requests for information about these professionals. The vast majority of those requests were made via the NASD Web site.

In general, I believe that both H.R. 658, in expediting the hiring of SEC professionals, and H.R. 957, in expediting the access of investors to important information about their brokers and brokerages, have merit. Nonetheless, I also believe that our panel

must answer a number of critical questions before proceeding with any markup on these matters. Moving in haste on legislation could cause multiple unintended consequences.

Regarding H.R. 658, we should, for example, discern how the SEC will ensure a fair hiring system in the absence of competitive service process requirements. We should also examine how we can protect the civil service status of professionals hired through an expedited process. In my view, we may ultimately identify alternatives to the proposed legislation that achieves the same objective.

With respect to H.R. 957, we must make sure that the information distributed by NASD about brokers and their firms via the Internet is accurate and proper, allowing individuals to dispute and correct information contained in the database. After all, a broker should not lose customers because they are guilty until proven innocent. The limited liability provisions contained in this bill should also not provide immunity for willful and malicious actions. We must additionally understand how the NASD resolves disputes concerning the information contained in the database.

In closing, Mr. Chairman, I look forward to the hearing from our witnesses on these two important legislative proposals. I also look forward to working with you to improve these measures in the weeks ahead, and encourage you to move forward deliberatively on these matters.

[The prepared statement of Hon. Paul E. Kanjorski can be found on page 30 in the appendix.]

Chairman BAKER. I thank the gentleman for his statement.

Mr. Renzi, did you have an opening statement?

Mr. RENZI. Thank you, Mr. Chairman.

I thank Chairman Baker for convening this important hearing, and for our guests; I am looking forward to your testimony. I also remain thankful not only to the chairman, but to the staff for allowing me to be involved in this important legislation.

I think it is important that I make a statement that this kind of common sense, simple legislation will help all investors. In particular, I agree with the comments that we have just heard, that the information be accurate and reliable. It is the intent of this legislation, that the association be able to put in place, procedures that allow for this accuracy and these proper reliable holdings to be made on different types of brokers.

I would also point out that good, useful disclosure is the foundation of our security laws, and is the enhancement to investor protection that we seek in this bill. I think the bill increases transparency and fairness in the market and does so at no cost to the investor.

So I look forward again to your testimony and thank you so much for joining us this morning. Thank you, sir.

Chairman BAKER. I thank the gentleman.

Mr. Israel, do you have an opening statement?

Mr. ISRAEL. Mr. Chairman, in the interest of time, I will submit my statement for the record.

Chairman BAKER. Mr. Emanuel, do you have an opening statement at this time? Are there additional members on our side with opening statements? If not, then I would proceed to the first panel. I would like to welcome here this morning two distinguished indi-

viduals, Mr. James M. McConnell, Executive Director of the Securities and Exchange Commission, and Ms. Colleen M. Kelley, National President of the National Treasury Employees Union. Your official statement will be made part of the record. We would ask if possible to make your statement within the five-minute period if possible.

At this time, I would like to welcome Mr. McConnell to make the opening statement.

STATEMENT OF JAMES M. MCCONNELL, EXECUTIVE DIRECTOR, SECURITIES AND EXCHANGE Commission

Mr. MCCONNELL. Thank you.

Chairman Baker, Ranking Member Kanjorski and members of the subcommittee, I appreciate the opportunity to testify before you today on behalf of the Securities and Exchange Commission in support of H.R. 658, the Accountant, Compliance and Enforcement Staffing Act of 2003. This legislation would provide essential authority to the Commission in its effort to quickly hire accountants, economists and securities compliance examiners. We thank you, Mr. Chairman, and the members of the subcommittee for your leadership on this vital issue.

Dramatic changes have occurred in the Commission's personnel environment during the past year. Thanks in large part to the efforts of this committee, the Commission has been granted the authority to pay higher salaries, provide additional benefits, and has received increased appropriations to fill over 800 new positions this fiscal year.

While the new pay authority and increased appropriations have eased the Commission's crisis in hiring and retaining attorneys, substantial difficulties remain in our ability to hire accountants, economists and securities compliance examiners. The reason for this distinction between attorney hiring and the hiring of other securities industry professionals is clear. Attorney hiring is excepted from civil service posting and competitive requirements; the hiring of Commission accountants, economists and examiners is not. When we are filling a vacancy under the competitive service, the process can take months to complete. Under excepted service authority, the hiring process can be completed in a few weeks.

In January, 2002, the Commission received its long-sought pay parity authority as part of the Investor in Capital Markets Relief Act. All Commission employees now have salaries comparable to the other federal financial regulators. Additionally, in August 2002, the Commission received a supplemental appropriation of $30.9 million, of which $25 million was earmarked for 125 additional staff positions. Higher pay and the additional slots have worked well with respect to our ability to hire and retain the attorneys the supplemental provided. However, our experience in hiring accountants has been far less successful. Despite our best efforts, only a few more than half of the new accountant positions made available in the supplemental have been filled.

The Commission's efforts to hire accountants under existing authority are further complicated by the special caliber of accountants that our mission demands. In order to ensure the adequacy of public company disclosures and to review the books and records of

broker dealers, investment advisers and mutual funds, the Commission needs hundreds of accountants, most of whom must have specialized experience in public accounting.

Our hiring difficulties are not limited to accountants. The complexity of the issues facing the Commission requires a similar level of skill and experience in our economists and securities compliance examiners. The solution to these problems is to allow us to hire accountants, economists and examiners as we have successful hired attorneys for years.

Most of the civil service protections accorded to excepted and competitive service personnel are exactly the same. These include veterans preference, bargaining rights and union representation, health care options, EEO rights, and retirement and leave benefits. There are a few differences. First, MSPB appeal rights are limited for a new employee's first two years in the excepted service, as compared to one year for the competitive service. However, the Commission has historically provided a one-year probationary period for all staff, including excepted service employees, and we will continue this policy.

Another difference might occur if the agency were to experience a reduction in force, since mandatory protections are lessened for excepted service employees in a RIF. A RIF is highly unlikely at the SEC, and we have the authority to extend the protections and we would exercise it to treat all employees the same.

Finally, an employee in the excepted service would not have the same advantages an employee in the competitive service if he or she wanted to transfer to another government agency. For all practical purposes, we simply do not lose program staff to other federal agencies. For all these reasons, there is no meaningful distinction between excepted and competitive service at the SEC.

Some may view the legislation you have crafted as highly technical and not very exciting, but I want to assure you that it is among the most important actions that Congress can take to support the SEC and its mission of protecting investors and restoring confidence in our markets. It is very exciting to those of us responsible for enforcing the securities laws.

Thank you for your support. I look forward to your questions.

[The prepared statement of James M. McConnell can be found on page 40 in the appendix.]

Chairman BAKER. Thank you, Mr. McConnell.

At this time, I now call on Ms. Colleen Kelley.

STATEMENT OF COLLEEN M. KELLY, NATIONAL PRESIDENT, NATIONAL TREASURY EMPLOYEES UNION

Ms. KELLEY. Thank you, Mr. Chairman, Ranking Member Kanjorski, and members of the subcommittee.

NTEU represents the 2,000 bargaining unit employees who work for the Securities and Exchange Commission across the country, including the accountants, the examiners, and the economists. As a professional accountant myself, I understand and appreciate very much the work that they do. With me today also is Mike Clampitt, the president of NTEU Chapter 293, which is our local chapter at the Securities and Exchange Commission.

Mr. Chairman and members of the committee, you know as well as I do of the serious staffing and morale problems at the SEC. For all too many years, this went unaddressed. Pay and benefits were grossly substandard; working conditions were not conducive to a positive working environment; and morale was very low. The good news is that we are making progress at the SEC. For example, a newly negotiated agreement between NTEU and the SEC has given employees confidence that they will be treated fairly on the job. Under the leadership of the Financial Services Committee, pay parity legislation was passed by Congress.

We are still, however, in need of the full funding that the president has requested, and we also need SEC management to fully implement pay parity and benefit parity with other FIRREA agencies. As the SEC struggles to recruit more employees, it would be a shame to lose qualified current employees to other agencies because they still offer better pay and benefits.

On the matter of new hiring, I think all interested parties are substantially together on the need to be able to quickly hire qualified employees as authorized. The question is, what is the best way to do this? I believe that the goals of this proposal can be fully realized without taking away the competitive service status from the accountants, the economists and the examiners at the SEC. I believe we should preserve the competitive service status for these employees because it does provide distinctions and advantages and rights for the employees once they are hired.

Keeping competitive service status for these employees is important when applying for positions elsewhere in the federal government, such as at the FDIC, at the Treasury and other agencies. Without it, employees cannot count their years of experience at the SEC when applying for other government jobs.

One of the arguments for pay parity was that the disparity in pay between the SEC and other FIRREA agencies meant that SEC management lost out on the advantage of an exchange of employees among FIRREA agencies. The argument was that such movement of employees was a benefit to the development of experienced, well-rounded professionals, and it was a benefit to the FIRREA agencies as well as to the employees.

In addition, as you have heard, excepted service employees have a two-year probationary period rather than a one-year. I am pleased to hear that the SEC has made a commitment that in any circumstances that would be a one-year time frame instead of the two-year. But this is a significant issue, and it is still a pending one prior to any formal resolution on the issue.

Competitive service is also important for bump and retreat rights in the case of a RIF. While I am sure today no one can imagine the SEC ever in that situation, we have seen agencies put in that situation with unintended consequences. I would suggest that the better approach would be to keep the SEC accountants, examiners and economists in the competitive service, but to grant the SEC the hiring flexibilities it needs independent of a change in status for employees.

In electing to focus on hiring flexibilities, rather than a total change from competitive service to excepted service, a model you may wish to look at is the government-wide provisions that are in-

cluded in the recent homeland security legislation that were developed by Senator George Voinovich. This gives the OPM the right to grant direct hiring authority to an agency that faces a critical shortage of qualified applicants. The SEC may have concerns about the length of time required to go through an OPM approval process, but Congress could directly grant this authority to the SEC. In doing so, I believe it is very important that it should be directed to first-level positions only. Obviously, employee morale would be severely hurt if new hires were brought in at higher-graded positions and the qualified on-board employees were not given the chance to be placed in these positions.

I would also urge that any such authority be temporary, and that the SEC provide this subcommittee and other appropriate congressional committees with a report detailing the guidelines used, the numbers, types and grades of employees hired under the authority, and the benefits and shortcomings associated with any change in the policy.

Again, I thank you for the opportunity to be here this morning to share NTEU's views with the subcommittee.

[The prepared statement of Colleen M. Kelley can be found on page 32 in the appendix.]

Chairman BAKER. I thank you, Ms. Kelley.

Mr. McConnell, I want to make sure that I am understanding the characterization of current SEC treatment of excepted service employees. Although by statute I presume there is a two-year probationary period, by matter of practice you limit yourself to the first year review, as is the case for competitive service employees. That being the case, and apparently this being a significant issue, is there any advisable reason why the committee should not simply make that change in this bill as well, to simply state that excepted service employees shall be subject to a one-year probationary period?

Mr. MCCONNELL. We would have absolutely no objection to that, because that is the way we will operate. If you were to ask an attorney at the SEC how long their probationary period is, they would say one year. So we would be happy to have that memorialized in whatever way.

Chairman BAKER. With regard to an excepted service employee, prior to their engagement, it is my understanding that they are given in writing a description of the consequences of going from competitive into excepted service, meaning if there is an issue with regard to a RIF or any other condition that might ultimately lead to their dismissal, they are made aware of that prior to their engagement and their employment is voluntary. They could remain in the competitive service by not coming to the agency, or taking that particular position.

Mr. MCCONNELL. That is correct, yes, sir.

Chairman BAKER. So there is notice. Are there any other elements where excepted service employees are treated differently from competitive service that you could offer to us that could be included in the bill to mitigate some of these concerns, beyond the probationary period? We have not really talked about it.

Mr. MCCONNELL. There is. In cases of a reduction in force, we actually have the authority to treat everybody the same. We have

specific authority to do so. We would do so, but you could add to this bill a specific provision that says the SEC shall treat all employees using their authority in the same manner under the circumstances of a reduction in force.

Chairman BAKER. So that would then leave us with just the one issue of a person who voluntarily applies for an excepted service position, knowing that if they were to leave and go to another position in the federal government they would have potential liability for lack of accumulated seniority, which is the only other point that I understand is being raised as an objection to the legislation.

Mr. MCCONNELL. Yes, sir, that is my understanding as well.

Chairman BAKER. Given the fact that these folks, and let me phrase a question; I am making an assumption that may not be correct. The difficulty in hiring most of these individuals is that they are not B-school graduates. It requires a certain level of skill sets in order to do the work the SEC is looking for. Much the same in the legal profession; that you are going after a certain type of individual with a very narrow, but very good set of abilities to perform a very specialized task within the agency. Given that person then is likely to be mid-career or advanced in career, this is a person who is fully capable of making a judgment about whether the risk of excepted service is good for their long-term career or not. How long, if nothing changes and we proceed with the current system, even though you have funding and authorization, to go from where you are today to get to the end of the process of having 100 percent ability within the agency?

Mr. MCCONNELL. If we do not obtain this legislative authority, I cannot tell you precisely how long it would take. I know that we could not do it this year. We have looked at this very carefully. We have analyzed it. I would like to be proven wrong, but I am confident that unless this legislation passes and passes quickly, the SEC will not be able to hire the staff that it has authorized for 2003. When it may actually happen will be certainly, I think, well into next year.

Chairman BAKER. And that is what the current statutory requirements that Congress has passed. If the Congress were to enact any additional standards in any new area, that would even make your job even more complex.

Mr. MCCONNELL. It would compound the problems we have.

Chairman BAKER. I think you have made a case for action, and given your responses I think we can make some modifications to the proposal that would go a long way down the road to eliminating objections.

Let me ask Mr. Kelley, while I still have a few seconds, if we were to make those two modifications, would you still have strong objection to the passage of the legislation?

Ms. KELLEY. Mr. Chairman, I would be very interested in seeing whatever the language would say, of course, and I would surely consider any suggested changes. It was very good news, as I said, to hear Mr. McConnell say that this morning. I was not aware of those commitments by the SEC. But the competitive service, the way it operates today within the federal government, is as a rule it is not given within an agency. It applies across the board to an occupation. For example, the attorneys; attorneys throughout the

federal government are excepted service. So this would be putting a whole new definition on excepted service. So I would want to have a chance to look through and think over the ramifications of that, and of course then react to whatever language you would be suggesting.

Chairman BAKER. I thank you, Ms. Kelley.

Mr. Kanjorski?

Mr. KANJORSKI. Mr. McConnell, do I understand that it is the intention of the SEC to work closely with Ms. Kelley to resolve these issues, and to see if we cannot get a very cooperative stance so that we could move this legislation as speedily as possible?

Mr. MCCONNELL. That is correct, sir. We have worked closely with the union so far. We have had several meetings and a good bit of interaction. I understand that the local union supports this legislation. I think we are very close.

Mr. KANJORSKI. Is it possible in the next week you could all meet and send us a nice letter saying all the issues are resolved and we should proceed through with this on suspension and get you this authority before we go home for Easter?

Mr. MCCONNELL. I am certainly ready to make the effort.

Mr. KANJORSKI. Well, let's do it. It sounds to me like the agency is pliable in regard and sympathetic to some of the issues raised by Ms. Kelley, and I think she has raised some important issues that, rather than expanding and changing all these definitions, we can get to expedited hiring very quickly, without a lot of major disturbances. So if I could recommend you do that over the next week and communicate that back to my chairman so we can move on this legislation as quickly as possible.

With that said, I wanted to take advantage of your appearance, Mr. McConnell, and I apologize for talking about an issue completely unrelated to what is here today. But Senator Grassley the other day I thought made a very significant point in raising the question that there is about to be a settlement against some of the corporations involved in the scandals, of about $1.5 billion. As a result of the structure of the settlement, the entire proceeds from the settlement will go to the investors fund for payment for losses. But because of the structure of the settlement, tax benefits will be derived by the corporations, which will reduce their tax burden and payment to the federal government. The end result of the $1.5 billion fine will be a negative revenue flow to the federal government of significant proportions.

I think he commented that he was surprised that the SEC had informed him that they do not consider anything else other than the immediate nature of the fine, and they do not consider the implications of the tax code and how that impacts on the revenues of the United States government. As you know, that should be important to us, and since we just increased your budget to $720-odd million dollars, you know, obviously we are going to have a shortfall, and we are going to be asking either for additional taxes or additional debt. I suspect that we are not going to have additional taxes. Because of the tax cut, we are actually imposing additional debt on future generations of Americans.

Are you familiar with this issue I am talking about? Do you have any reason why; I thought Senator Grassley was eminently correct

in his analysis of a federal agency imposing fines that directly impact in a negative way on taking more revenues from the tax payers, and those benefits not passing into the treasury, but passing onto the benefit of investors who lost in the recent debacle in the market.

Mr. MCCONNELL. Sir, I am not sufficiently familiar with that topic or that issue to discuss it. I can assure that we will take it back and have the appropriate people respond to the subcommittee or directly to you in whatever manner.

Mr. KANJORSKI. I would appreciate it if you could do that very quickly, and also respond to Senator Grassley, because I thought it was an extraordinarily well-raised issue that generally does not catch the light of day, but has a tremendous impact on $500 million or $750 million on the loss of revenue to the United States government at a time when we are struggling, and we have given your agency a significant increase.

It would be a shame to see the significant increase that we have given the SEC reverberate with the loss of funds for other vital projects of the United States government through the loss of these revenues as a result of your structured settlement. So if you could address that issue, and if for some reason you are not familiar with it, I happened to see it in a news statement by the Senator, so we could contact whatever media that had that news conference. I suspect he must have written a letter on the subject. But I would appreciate a response for myself on that issue, and also to Senator Grassley if that is possible.

Mr. MCCONNELL. Yes, sir. We will take care of it.

Mr. KANJORSKI. Thank you very much.

Chairman BAKER. I thank the gentleman.

Mr. Renzi?

Mr. RENZI. I yield back my time to the Chairman, for any comments he might have.

Chairman BAKER. Terrific. I appreciate the gentleman yielding.

While we are on the topic that Mr. Kanjorski was speaking to, since we are speaking through you to other people, I will try to keep it brief. I also have concerns previously expressed. From published press reports, I think the companies that have been found guilty of wrongdoing should have the fiscal responsibility for paying the obligation and not have it engaged through insurance or the shelter of tax provisions. But there is another important element of this as well, and that is that the defrauded investors get some recompense as a result of these settlements. The proposed settlement, as I have read it, was $1.4 billion, with approximately $900 million previously identified in press reports as likely to be given back to defrauded investors, as identified by the SEC.

The troubling thing that I have read in recent days is that some states now are planning on whatever portion they may get back of these funds, rather than using them for investor restitution, are talking about DMV offices and a whole host of operational concerns. I believe that is highly inappropriate, unless of course, we are going to repeal the driver's license of some fraudulent investor as a result of his DMV office. I think people would feel much better if they got a small check in the mailbox saying, the United States government has been working on your behalf, one, to put these

guys behind bars; secondly, to get compensation back; and thirdly, this is your money. I liken it to the case where you are back home, your car is stolen, you call the sheriff, you get a call back two days later and he says, good news, we found your car; the bad news is the sheriff's going to keep it. Somehow that does not seem to me to be justice.

This has been a bipartisan effort of this committee, to get investor restitution, and to have the biggest settlement ever by the SEC and others hammered together over many, many months, I would hope that this glimmer of provision would also be constrained, much like the gentleman suggested with regard to corporate abuse, that we constrain the disposition of that $900 million or whatever, specifically to investor restitution. So when the folks are responding to Mr. Kanjorski's issues—just please add mine onto the bottom of the letter.

Mr. Kanjorski?

Mr. KANJORSKI. If you will, Mr. Chairman. I think you would join me, that you would be displeased to see the Federal Treasury suffer the loss because of the tax credits that the corporations may gain as a result of the nature of the structure of the agreement, so that all the taxpayers become losers, even though a significant amount goes to the investor fund, but it really is not corporate money that is going there, it is taxpayers money because we would be losing those revenues as a result of the corporate tax credits.

Chairman BAKER. I thank the gentleman for making that point. I agree. The wrongdoers should be held accountable, no one else. However we have to construct these settlements in order to ensure that, I think that is of principal importance. Secondarily, if we are going to have $900 million sent to anybody, it ought to go back to the people it was taken from. I think those two points can be joined together very successfully.

I thank the gentleman for yielding his time.

Mr. Israel—

Mr. ISRAEL. Ms. Kelley, you represent many workers in my district, including employees at the IRS' Brookhaven campus and customs workers at JFK. Can you tell me how employees at other agencies will be impacted by this bill? Is there a ″camel's nose under the tent″ problem here? What is the implication for other agencies throughout the government?

Ms. KELLEY. I guess depending on how the language is written, it could be argued that no one would be impacted but the SEC. But as we all know, as soon as this starts, then it is just a matter of how quickly it spreads. In thinking about the three primary issues that have been identified; the one-year probationary period, the impact in a RIF and the ability to have years of service count throughout the government; if the SEC is willing to commit to the one-year probationary period and use their authority to say all employees are treated equally in a RIF, then it almost seems as if it would be much easier to get to the crux of this problem to maintain their competitive service status, and figure out how to get this hiring done faster, rather than making up new definitions for what excepted service will or will not be.

I do have the fear that you expressed, because we have seen it over and over again in this whole area of flexibilities, that once a

new definition arrives for a traditional word or phrase that has always existed, it tends to impact not just those originally intended. So it is a very big concern—

Ms. KELLEY. Again, I think probably the easiest way would be to say they continue as competitive service employees, but let's figure out a way to do the expedited hiring, which is the only thing that the agency has, or the primary goal the agency has identified, which we agree with. We want to find a way to help make that happen. If these other things that are traditionally in excepted service are not going to be, then it does not seem to make a lot of sense to rewrite that. I would hope we could focus in this next week's discussion on the hiring issue, and figure out how to do that without impacting the status and redefining everything that everybody knows today.

Mr. ISRAEL. I yield back.

Chairman BAKER. I thank the gentleman.

Mr. Emanuel?

Mr. EMANUEL. I was just trying to stall until I came up with my questions.

Chairman BAKER. I am sure that was sufficient time for a guy like you.

[LAUGHTER]

Mr. EMANUEL. I appreciate that confidence.

Actually, I do first of all, without trying to brush over a point, that if you can work it out, clearly you have had discussions. I think that would be a great thing. I think what Ms. Kelley said in relationship to using the model that was negotiated and recommended by Senator Voinovich during the homeland security debate could be a guiding principle, since we have been around this bend with other employees, and it may be a good template here.

I do believe, as somebone who worked for a short period of time as an investment banker, that clearly the SEC is overwhelmed. Clearly, the SEC needs both not only financial resources, but also human resources, and I think we can accomplish that goal without doing any damage or long-term hurt, not here, but using it as a model that other agencies then would take too far. My goal is, and my wish, is that this would not be an attempt to get one's goods through customs, meaning that we would do something that would damage, I think, worker protections that have been a long-term and long-time standard here.

To the issue of what both the Chairman and the ranking member talked about as it relates to the agreement reached on some of the corporations, I have one clarification. Usually, it is not a choice. This is not a choice between the investors and the United States Treasury. That is a false choice. It really relates to how the company is getting the tax benefit.

I do not in any way want the language to come back, and it is presumed that somehow we want Treasury to get the resources and then do it as chump change to the investors. Those two are not the trade-off. It is whether the corporation that has been in violation that passes, and then getting extra credit in the tax structure. So I would say, how you do that is very—and I know again, Mr. McConnell, we are talking through you to others at the agency. I think it is a very, very important point, because I do not think it

should be constructed or implied by any of the questions that we somehow presume that it is a choice between the investors and the Treasury.

Thank you very much to both of you, and good luck over the next week.

Chairman BAKER. Thank you, Mr. Emanuel.

Mr. Scott?

Mr. SCOTT. Yes. What time frame does the SEC believe that it will be fully staffed in order to meet the demands of the Sarbanes-Oxley legislation?

Mr. MCCONNELL. That question depends on the success of this legislation, it seems to me. Speed is of the essence with us obtaining the authority to be able to hire more efficiently. As I stated earlier, if this authority is not available to us for hiring, we will not be able to do it this year. We will not be able to hire those people this fiscal year. How far into next fiscal year it would go, I cannot speculate. As you may appreciate, the same people who make the hiring decisions are the same people who are implementing Sarbanes-Oxley and who are going after the bad guys. So we just cannot but throw so many resources at hiring. We have got to have some help to do it.

Mr. SCOTT. The federal government is experiencing a large number of employees who are eligible for retirement coming up. What impact would this have on the SEC? Are you all expecting a similarly large surge of retirements?

Mr. MCCONNELL. We are not facing that same sort of bulge that a lot of other agencies do. We have a very young workforce. Our turnover in the past has been so high that we have dealt with planning for replacements as a regular course of business. With pay parity, we have substantially improved our ability to retain people. Our attrition rates are down dramatically and it has been very helpful. But at the moment, currently we do not have that same kind of retirement bulge that you see in a lot of other agencies.

Mr. SCOTT. Finally, if I have time, did I hear you correctly, did you state that the unions are fully on board?

Mr. MCCONNELL. I do not think I can make that statement.

[LAUGHTER]

I believe that we have a very common interest all across the spectrum on this, and it seems like we can work something out, but there are certainly some differences.

Mr. SCOTT. What are those differences, may I ask?

Ms. KELLEY. Based on our public conversation this morning for a half an hour, it seems like the only difference now is figuring out how to get the hiring done fast. It is not about redefining or the concerns that NTEU had raised about probationary periods, because it would be the same as in competitive service, so let's just leave them there. They would not have different rights in a RIF, so let's just leave them in competitive service.

So I think we have isolated the issue to quick hiring and the Commission's ability and authority to do that. I think that is the open question, and hopefully we can find a resolution that we could agree on that would maintain the competitive service and get these

new employees on board as soon as possible, which is what we all want. We do have a common interest in that.

Mr. MCCONNELL. If I may, I would like to wade back in on that same issue. Speed is critical. We need this authority right now. Anything that delays it, delays our ability to bring people on and to meet the goals of Sarbanes-Oxley and to meet the goals this Congress has set for the SEC. I just have to leave you with that.

Mr. SCOTT. Thank you.

I yield back the balance of my time.

Chairman BAKER. Thank you, Mr. Scott.

Ms. McCarthy?

Mrs. MCCARTHY OF NEW YORK. Thank you.

We are hoping, too, that certainly with the passing of this legislation it is going to make it a lot easier for you to do the hiring. But hiring is one part of the process; accepting the applications is another part that you have to go through. From what I hear from an awful lot of people, not just with the SEC, but from other job applicants, they apply and then they hear nothing. Obviously, when someone is applying for the job, they are not going to wait a long time. Obviously, they want to get into the job market and work faster. Just looking at how you take the applications and the process that it has to go through before it can be moved on back to the point of being hired, hopefully we can streamline that for you a little bit.

I guess basically what it comes down to, do you have any idea how long it actually takes from the time someone applies? Do you actually call those people back, say, that they are in the pocket, that they have a decent chance of being hired, or anything else like that so they know? That is usually how the best applicants usually end up going somewhere else.

Mr. MCCONNELL. I am afraid that I must admit that at the SEC, like at many other agencies, it takes months sometimes for people to hear. This legislation will give us the ability to move that along in weeks, so people will know very quickly what their status is and they can move on to other employment opportunities if that is necessary.

Mrs. MCCARTHY OF NEW YORK. What I would say which would help obviously everyone is to really sit down, as the chairman has mentioned, and work out your differences so we can get this on a suspension bill and get you going. That would be the best thing for everybody.

Thank you, Mr. Chairman.

Chairman BAKER. Thank you, Ms. McCarthy.

Mr. Lynch? Do you have a question?

Mr. LYNCH. Thank you, Mr. Chairman.

I would like to thank both of the witnesses for coming here and helping the committee with their work.

President Kelley, I just have a two-part question, if you will. First of all, I understand under the legislation that current employees may be grandfathered under certain treatment under civil service, and then new employees would be treated somewhat differently. As a former union president myself, that always presented a difficulty for me in trying to enhance solidarity and unity, while having two sets of different rules for my employees.

My first question is, have you had discussions with your members about how this would be handled, and if you might relate to the committee some of their concerns, if you have heard from them. And also just a general question, how do you think this legislation could be improved? What do you think might not be addressed here within this bill that you would like to see addressed?

Ms. KELLEY. On the first question about the grandfathering, that is a very interesting point. As a former union president, I can see why it would be on the top of your list. The discussions with the employees in large part have to start with the education process as to what it means to be excepted service versus competitive service. Once the discrepancies are understood, then there is a clear concern that, will they be impacted, too? While not often, but once in a while, it is important for unions to agree that there has to be a different treatment and grandfathering has to occur, but that is in a case where I think there can be such distinct or specific cases made as to why that is necessary to the success of the agency, as well as the success of the government. I do not think that is the case here. I do not think the separation between excepted service and competitive service is necessary.

I think we have established today that really at the core of this is just about expedited hiring, and not about the other things that go along with the excepted service. So I can tell you that the local chapter, Chapter 293, and the employees who we represent are opposed to the hiring of future employees as excepted service employees, and are interested in figuring out how, of course, to get the Commission staffed up to where it needs to be, but to find the right solution and not to create this grandfathering provision when it really is not necessary. That is not the problem. The problem is how do we get employees hired faster and the qualified employees that the SEC needs.

So that is the first part. I guess to the second part of your question about what else, I have really been focused solely on this issue because it is the one that touches the employees, both current and future, and their working conditions. And also I view it as a responsibility of NTEU's to help to ensure the ability of the SEC to hire qualified employees. Employees who we represent want to be successful in the workplace. For them to be successful, the agency they work for has to be successful. So we come at this from the same direction.

Mr. LYNCH. That is great.

Thank you. I yield back.

Chairman BAKER. Thank you, Mr. Lynch.

If no member has any further questions, I want to express my appreciation to both of you and offer that if my office can be of any assistance in facilitating a resolution on the pending matter, I certainly want to be involved and helpful. It would be my intent to try to move this bill as quickly as is practicable. I think any protracted delay would not be good. Let me suggest that if we can informally visit over the course of early next week, perhaps we can get to a point where we can move this to the suspension calendar and accomplish what we all want to see happen.

I thank both of you for your appearance here today. Thank you.

Mr. MCCONNELL. Thank you.

Chairman BAKER. I would also at this time ask for our second panelist to come forward.

The purpose of our second panel is to receive testimony relative to H.R. 957, the Broker Accountability Through Enhanced Transparency Act of 2003. To that point, I welcome Mr. Doug Shulman, President, Regulatory Services and Operations, the National Association of Securities Dealers.

Welcome, Mr. Shulman.

STATEMENT OF DOUG SHULMAN, PRESIDENT, REGULATORY SERVICES AND OPERATIONS, NATIONAL ASSOCIATION OF SECURITIES DEALERS

Mr. SHULMAN. Thank you, Mr. Chairman.

Chairman BAKER. Your formal testimony will be made part of the record, and if you wish to present your views within the five-minute expectation, that would be great.

Mr. SHULMAN. Thank you very much. That would be great.

First, I very much appreciate the opportunity to be here and testify on the Broker Accountability Through Enhanced Transparency Act of 2003. This bill will allow NASD in summary basically to take information we can now make available via toll-free line and via mail, and move that information onto the Internet, which is what investors are looking for now.

Let me give you quick background on NASD and our public disclosure program. As you know, we were chartered by Congress to write the rules which govern the behavior of securities firms, investigate firms and do examinations of their conduct, and when necessary do enforcement actions and disciplinary actions on those firms. Every broker-dealer who does business with the investing public must be a member of the NASD. Our responsibilities range over a wide variety of activities, including transparency in the fixed income world, to our trade system, licensing and registering brokers, doing our traditional regulatory activities, investigation, enforcement, and dispute resolution.

Clearly, as a regulator, we have a couple of jobs. One is the traditional job, writing rules and making sure they are enforced. The second, and vital to what we do, is getting information into the hands of the investing public, so they can make informed decisions when they enter the capital markets. In the case of what we are trying to get done and what your bill would help us do today is getting information about the brokers with whom they do business.

A quick background on our public disclosure program. We have 665,000 brokers in the securities industry who do business with the public. All of them register with us. We then make certain information available to the public to help them make decisions about which broker to use. The information we make public is disciplinary actions, customer complaints, arbitration decisions, civil judgments in securities or commodities-related activities, felony and misdemeanor criminal convictions that are investment-related, as well as bankruptcies and unpaid judgments and liens. To give you a sense of the volume of the program, we launched this program in 1998. We had about 6,000 people look for information on their broker in 1998. Last year, we had 2.5 million people come in looking for information on their broker.

To speak specifically about the bill, what we are looking to do is to provide the same exact information we make available to people via paper online in real time. In 1990, Congress passed the statute which gave us statutory liability protection for our toll-free number and for paper-based information that we give to investors. Clearly, Congress was quite wise in insisting at that time that make a toll-free number available. The toll-free number was the way that an investor could easily get information on their broker and quickly.

Over the intervening years, the last 13 years, we had the Internet revolution. Today, 96 percent of the inquiries that come into NASD come in via the Internet. Simply put, what we are trying to do is make the process for those investors to get the information from NASD about their broker meet the investor's expectation of getting that over the Internet.

Let me comment, in speaking with some of your staff, a few questions have come up, and let me comment on those directly. One is the 1990 statute gave us good-faith liability. This statute does not have the qualifier of good faith in there. There are three reasons why we think this is sound. First is our desire to secure a uniform federal standard. The good-faith criteria that was in the bill, if it ever came to this and an investor disputed that, we would have to basically look at and understand defamation laws in all 50 states. It would be cumbersome and expensive for us to do that. Our rules are written under federal security rules approved by the SEC, and we think establishing a uniform standard for all 50 states is a good thing.

Second, this bill would conform to the current case law that is out there on NASD as an SRO with liability protection. We have been given absolute liability without qualifiers in every case that has come along about us doing our regulatory job. This bill, without putting the good faith in there, would basically be a conforming, and make sure the statute conformed to what the courts have ruled.

Finally, this bill, and wisely so, you asked us to make sure that we had procedures that were approved by the SEC to handle any disputed information that goes out in the public about a broker. We think those procedural safeguards are in essence the same thing as making sure we operate in good faith, and hence obviating the need to have that good faith standard.

Let me just finish up by saying that while this bill does not address what we put in the system, it only addresses how investors can get this information from the system, you should know what we go through and how we try to decide the balance of information we put out about a broker. The word ″balance″ speaks clearly. What we need to balance is transparency in the capital markets and getting as much information out to investors as possible, against the fact that we are getting information about a broker out into the public and we need to make sure we are sensitive about getting the right information about a broker, and that broker is treated fairly in the public eye.

When we go through a process, which we are going through now, which really has nothing to do with the bill, but when we look and see what information we put into the public, we have extensive dialogue with the industry, both the firm representative and brokers,

with investor groups, with the states and other SROs, and finally any of our proposals have to be approved by the SEC.

We continually strive to get that right balance. It is not an easy balance to get. Our default is always towards getting investors more information, with one major caveat. We are quite aware of the issue of identity theft. We do not and will not put information out about a broker that could be used to compromise that broker's safety or reputation, et cetera. The things we will not put out are Social Security numbers, home addresses, physical descriptions, the kinds of things that are used in identity theft. We are very careful about that.

In conclusion, this bill is trying to get investors information in the form that they clearly are demanding it. It is going to go a long way towards letting us as a regulator do our job better, which is to get information into the market, to keep markets safe, and to make sure that investors are protected.

I would be happy to answer any questions.

[The prepared statement of Doug Shulman can be found on page 46 in the appendix.]

Chairman BAKER. Thank you very much.

I think it makes a lot of common sense, given individuals' access to the Internet to get information. I do not have any hesitancy to think that this is a good thing to do. I guess the only point that we need to have clarification on is the mechanisms to ensure that accurate information is provided. With regard to a civil judgment, felony, misdemeanor, bankruptcy; those things are pretty clean and clear-cut. You are not going to put anything out just because they are in court. You are going to wait until the appeals are final and determinations or sentence is imposed.

The area where I have some sensitivity, though, would be customer complaint. If I called in and said I am entitled to return of funds from my account and I have not gotten them in six months, that is a complaint. If I call in and say I acted on my broker's advice and I lost money, I do not know if that is a complaint. How do we sort that out? What process do we go through before we report a broker has 26 complaints against him? What is the review process that enables you to feel comfortable in moving forward and having that on the Internet?

Mr. SHULMAN. That is a great question, Mr. Chairman. Let me try to answer it.

First, let me just state what I said before, that this bill is not about what information is out there, but clearly it will make sure there is more information out there and that the right information is out there. In terms of customer complaints, as I said before, it is a very delicate balance. We do a couple of things to ensure that when complaint information is out there, it can be put in context.

The first thing we do is when we release customer complaint information, that information, the broker has the opportunity to have their side of the story right there next to each other. So basically if it is in dispute that this is a legitimate complaint, that will be flagged by the investor. Second, when we look—this is a longstanding procedure in the securities industry; it has been for years we have released this kind of information; when we look at the balancing act around customers, first as I mentioned, the industry is

fully involved, lots of people are involved in this. If there is information on someone's record that is clearly erroneous or defamatory in nature, it can be expunged from the record.

What we try to do is have information out there that will engage someone in a dialogue with their broker. So if someone comes out and sees there is one customer complaint, first they will see what the complaint is and see the broker's answer. Second, we are trying to put information in context separate from this legislation. We have a review going where what we are trying to do is get authority from the SEC to put this information in context, so we would be able to say 4 percent of all brokers have a complaint against them; less than .5 percent of brokers have five complaints against them, or whatever the information is. So we can put it in context for an investor.

Chairman BAKER. Let me jump to another point before I expire my time.

Assuming for the moment we have got a system in place that minimizes erroneous reporting, that reflects accurately the professionalism of a particular brokerage firm, using your information from 6,000 inquiries in 1998 to 2.5 million last year, once we are fully online, it is not incomprehensible, given the ease with which people would feel they could access this information, to have several millions of hits beyond the 2.5 million you currently are responding to. What about your resource limitations to be able to adequately respond? I know in a congressional office, the number of e-mails you get versus letters, versus telephone calls, a disproportionate share is moving radically in one direction. It makes it very difficult to stay up with it.

Do you have concerns, or what is the prognostication a year or two out from now if this is authorized? How are you preparing for the additional inquiries?

Mr. SHULMAN. It is a great question. First, my team just told me I said ″1998.″ I meant ″1988.″ So hopefully it will not escalate. We want investors coming in, but we do not anticipate huge escalation.

This actually would make it much easier because right now we have to go through the cumbersome process of getting the phone call, putting the information in mail, mailing it out to the investor, because the investor then cannot access the information quickly, they might have to come back and ask for more information, et cetera. What we think this would do is actually limit the resources and save us resources, because the investor could pop it up online. All we need to do is have the program coded correctly so that the information can be accessed online.

Chairman BAKER. So this will not facilitate online complaint initiation. Complaints will still have to be originated in the traditional way. This is only to send the information out, not to collect it.

Mr. SHULMAN. Exactly. This is just about the information that the investor gets, not about all the channels that information comes into the NASD and other SROs.

Chairman BAKER. Terrific.

Mr. Kanjorski?

Mr. KANJORSKI. This is just about publication?

Mr. SHULMAN. Yes.

Mr. KANJORSKI. That is pretty important, isn't it? Isn't that the whole issue in libel law and slander law; publication?

Mr. SHULMAN. Excuse me?

Mr. KANJORSKI. Publication is the important thing. It is one thing to send a letter or information to an inquiry made over the telephone, and another thing to hire a bulletin board and put up information on it, that everybody that drives down the highway can see, or everybody that uses the e-mail bulletin board can see. I am very much interested in this whole idea of what happens with a mistake. In your testimony you said you were worried about identify theft. Hell, I am worried about character theft. What if you make a mistake? The person is dead. What happens if someone makes a customer complaint or some information is put up on the Internet that is absolutely false. You say there is a method to expunge it. If you get a court order, how much does it cost for an average broker or person who feels they are being slandered or libeled to get a court order? You are talking tens of thousands of dollars, and months of time, before you can get that off.

Mr. Shulman, I am very sympathetic that the best information be made available, but I qualify it with ″best″ information, truthful information; examined, studied, conclusive information. I hear you talking about customer complaints, not final jurisdiction or a judicable issue that has been finalized, but something that is in the process of occurring, where we do not know what the final result will be. Once you put that on the Internet, it never leaves existence.

Now, I know you are not in public life, but I am and I know the Chairman is, and all you could do is make one charge against a politician that gets printed, and it can be the most ludicrous charge in the world, and it can never be expunged from the obituaries that exist across the country. You revisit that erroneous mistaken charge a million times.

We are sort of enamored with a certain thickness of skin to accept that. But now we are talking about people's livelihoods. What more important thing to a broker does he have than his integrity and his credibility? If you mistakenly put something up on the Internet that is grossly erroneous, he probably will not find out about it for a reasonable period of time, until some of his friends at the bar several weeks later are joking about it, and he happens to hear his name mentioned. I mean, no broker is going to get in the morning and run to the office and throw on NASD and see what they are saying about me today. So it is out there, and once out there, it gets captured in many lines or recordings across the country.

Something said in a U5 report would be put on the Internet, if I understand this. That is a one-sided statement, as I understand it, why a person was discharged. Have you ever been in a circumstance that there has been an employee-management disagreement, and either a discharge or a firing occurs, or a quitting occurs, and there are different facts and circumstances as to why it happened?

Let me give you an example, that I would worry about just from a sexual aspect. The young lady is not honoring indications from her employer to be responsive in ways that are improper to be re-

sponded to and she gets fired. He puts down that she was fired either for incompetence or she was fired maybe for being promiscuous. How in the world when it comes to that U5 is she ever going to capture back her character or integrity?

Now, I think information, and this is the issue that I want to get to; are there such corrupt brokers in the United States that we really need all this information put up on bulletin boards in a permanent way? I mean, we are doing like a Megan's Law here. I understand that with sex perverts, but these people are generally not sex perverts. They have complaints filed against them; some proper, some improper. I am wondering, the standard you are using here in your industry; even doctors who commit acts of negligence or gross and wanton negligence in the majority of cases once resolved or settled, are sealed and no one can ever hear about it. There was an actual court case where the damage that occurred, proven or ceded to, means that everything is locked up.

Most lawyers who are subject to charges are limited as to what part of the proceedings can be made public. Judges; well, they are a special branch in our system. Very seldom do we ever find out their dalliances. But most of these things are held in very tight control because of the tremendous amount of damage to the individual, the irreversible nature of that damage to the individual if improper facts or statements or conclusions are made and posted.

So it would seem to me that you have a burden to show us how bad your industry is, that these crooks are running all over Wall Street, and if we do not throw out the whole thing on the Internet, that the financial markets are going to come apart. I do not believe that is true. I do not think there is any more impropriety out there than in any other profession or activity. We want to find a way to protect the public against the 1 percent, that 2 percent, that 3 percent—whatever it is. But at the risk of damaging the other 97, 98 or 99 percent, with irreparable damage if mistakes are made, I do not understand that. I think the balance is out here.

It is one thing about; hello, NASD; you have a broker Jack Smith who I would like to find out information about. You send him a confidential letter back to that one inquiry. That is just one single person getting that information. Once you put it on the Internet, anybody can use that for any purpose. If that information is not absolutely accurate and tested, it can never really be expunged because it exists somewhere in its improper form. Secondly, you literally have committed a character theft or assassination. Those people can never get their reputations back.

I think we ought to slow down. We are not trying to prevent terrorists from attacking the country here. We are not trying to save a life here; maybe some assets. But aren't we running to open up a field of uncontrolled flow of information based on innuendo and charge, without substantiation, to the extent that it could be tremendously injurious to individual lives? What do we do? You are asking here for immunity. You want to even take good faith out. What, do you want to be able to put bad stuff on the Internet under bad faith? Why wouldn't you want to make a standard of at least good faith?

What if you had somebody working for NASD that did not like their spouse, and they decided to open up, just write charges out there? What do they do?

Mr. SHULMAN. If that happened, sir, clearly we have rigorous SEC oversight. I think the SEC—

Mr. KANJORSKI. You what?

Mr. SHULMAN. There is rigorous SEC oversight.

Mr. KANJORSKI. Oh, you are going to call them in and discharge them for a couple of weeks or give them a fine, or maybe even fire them. What does that do to the person who is injured? They do not give a damn. It just seems to me that we have an obligation. We are dealing here with the most sacred and important thing and privacy that we have, the ability to destroy character and integrity of individuals. Unless the injury, if it occurred in society generally, is so much greater that we should waive that protection, I think we have to walk very softly.

I hate to think that I was a broker for 25 or 30 years, and some dissatisfied customer could write anything about me and make any charge, and it gets up on the Internet and my career is gone, particularly if I am in a small town or a small community. It is gone. What do I do? Who do I look to? I go to you and I say, that is not right. There is no factual support for this. And you say, oh well, it was done in good faith, but hell, we do not even have to have good faith; we just have immunity. Congress gave it to us. We just stripped you of your protections.

I would urge, Mr. Chairman, and Mr. Shulman, we should do something to make sure we make information more readily available. But let's not run down this road. I was just thinking here. I remember in contract law in law school, hell, I think it is the law in all 50 states of the union, you cannot post on a bulletin board in a business place if somebody owes you money. Why? Because you destroy that person. It is a private relationship and you destroy that person's reputation.

And yet you can put on that somebody did not pay an account; somebody owes money; somebody did not do something. You are vitiating all that expression of the long-time common law protections for individual rights.

Chairman BAKER. Mr. Kanjorski, if I can suggest that with this vote announcement that just occurred; there is a series of three votes. Given the few number of members remaining, it might be possible to proceed with other members?

Mr. KANJORSKI. Sure.

Chairman BAKER. And try to conclude.

Mr. Renzi, do you have a question? Mr. Renzi waives.

Mr. Scott?

Mr. SCOTT. I have one. I have some reservations about this as well. I do not think I can more eloquently state them than Mr. Kanjorski did—excuse me, I hope I pronounced your name correctly.

I would like to ask you about the toll-free number that you are currently working under. How do you get that toll-free number out, communicate it out to the investor community so they know that it is there?

Mr. SHULMAN. We use a variety of venues. We try to make it available through PSAs in the past. We have done statement stuffers with securities firms so that they know that there is a place to come and get that information. We continually talk about it in public appearances. We do that on our Web site so people know where it is. So we try all of the traditional mechanisms that you would use to get information out into the public.

Mr. SCOTT. Okay. Thank you.

Chairman BAKER. Thank you, Mr. Scott.

Ms. McCarthy?

Mrs. MCCARTHY OF NEW YORK. Thank you.

Just to follow up, I live on Long Island and we have certainly a number of brokers that are in my district, my son included. Where exactly do you get the information that is going to go up on the Web site, especially any information that might be damaging? And just to follow up quickly because we are on time, being that people seem to want this information, based on the hits that you have had on the Internet, why wouldn't the securities firms themselves actually as a service bring this up themselves? I do not know whether they have ever been asked or not, but at least they would have a little bit more control over the information that is going up, to protect their brokers from, in my opinion, God forbid somebody makes a mistake. You can ruin somebody's life.

We have seen that. Talk about reputations; we have to go through campaigns every two years, and I look on the Internet and what they say about me, I do not even know who they are talking about most of the time. So I am very sensitive to this. But where do you get your information?

Mr. SHULMAN. It is a great question. Let me answer it.

First, just for clarity, we are not planning on posting information up on the Internet that people control. We are looking to get the exact same information. When someone calls and does an inquiry right now and says, send me information on that broker. What they would have to do is go in, not look through a list, but query and say, send me information on Joe Broker. The only difference would be instead of receiving it via the mail, it would come up on the Internet. But it is not a list.

The place we get the information is, information comes into NASD; comes into the New York Stock Exchange and other SROs; comes into states; comes in via registration forms where we run all of that information; as well as complaints that go into the SEC and other kind of information. So it comes from a broad range of federal, state regulators; from the firms themselves; as well as from SROs, is where the information comes from.

Chairman BAKER. Thank you, Ms. McCarthy.

Mr. Sherman?

Mr. SHERMAN. One quick question. I share the ranking member's concerns. Would the broker be able to put right there a rebuttal to anything?

Mr. SHULMAN. Yes, absolutely. The other thing I would say about that is, these brokers, Congressman Kanjorski brings up many very good points.

Mr. SHERMAN. Let me ask one other thing, and that is, if something was posted about a broker, would that broker be notified immediately that something was posted or supposed to be posted?

Mr. SHULMAN. Yes. The debate that has gone on around this is trying to weigh the investor's interest if they are on the complaint, which is clearly the most controversial; the investor's interest to know that there are complaints out there, against the broker's privacy right. I just would remind you, this legislation does not address that issue. It only addresses the way that that information—

Chairman BAKER. Will the gentleman yield on that point?

Mr. SHERMAN. I yield after noting that a broker's life can be ruined by bad and false charges, but an investor's life can be ruined by a bad or false broker.

Chairman BAKER. I thank the gentleman for yielding.

I just want to make a point which I think I understood previously, that prior to the publication, distribution, 1-800 number response, that the broker is informed prior to the final determination and the information being released. Is that correct?

Mr. SHULMAN. The complaint usually comes directly to the broker. There are multiple pieces of information, but we focus on the complaint. That comes to the broker.

Chairman BAKER. But let's take an odd case. Let's take where the person is sophisticated and does not go to the broker and make the complaint, but goes directly to the SEC and files. Prior to publication of that information, does the SEC contact the broker? How does that work?

Mr. SHULMAN. If it comes into us before, we make that information available to the broker.

Chairman BAKER. I think what would be helpful to us is if you just gave the committee two or three practical examples. Joe Broker hears the complaint stemming directly from the defrauded investor or angry investor; it comes to the SEC; angry investor comes to the broker first; angry investor goes to some local consumer organization and they file. In other words, give us a practical view of how your world works, and I think it will be a great help to allay the concerns of the members that the brokers are not going to be put in an untenable position by publishing this on the Internet, as opposed to mailing it out or giving a phone call; that the processes that you vetted over the past 13 years give ample protection, or otherwise we would be getting significant calls from brokers, I suspect right now. Is that a fair request?

Mr. SHULMAN. I think that is a fair request.

Chairman BAKER. If you could get that back to us at your convenience, it would be a great help to us in having the committee reach a level of comfort.

If there are no further questions or comments, I certainly appreciate your appearance here today and your support of the legislation. We look forward to working with you in the days ahead.

Mr. SHULMAN. Great. Thank you very much.

Chairman BAKER. We stand adjourned.

[Whereupon, at 11:24 a.m., the subcommittee was adjourned.]

A P P E N D I X

March 6, 2003

Opening Statement

Chairman Michael G. Oxley

House Committee on Financial Services

Subcommittee on Capital Markets

"Hearing on H.R. 658, the Accountant, Compliance and Enforcement Staffing Act and H.R. 957 the Broker Accountability through Enhanced Transparency Act"

March 6, 2003

Thank you, Chairman Baker, for holding this important hearing. This morning we will discuss common-sense, no-cost, and what I hope and expect to be, bipartisan legislation.

Both bills before us today will undoubtedly increase the effectiveness of the securities industry's chief regulators – the Securities and Exchange Commission and NASD – in serving and protecting investors. They will do so, I might add, without creating burdensome and costly rules and regulations.

The purpose of Chairman Baker's ACES Act is simple: it would address the SEC's staffing crisis by allowing the agency to more quickly fill critical accountant, securities compliance examiner, and economist positions with the best possible candidates on an expedited basis. That is to say, it would permit the Commission to hire accountants, examiners, and economists as easily as it currently can hire attorneys.

The need for this legislation has become even more urgent in light of the Commission's large, and appropriate, funding increase for this fiscal year. The agency intends to use a large portion of this increase to hire over 800 new professional staff.

When considering the ACES legislation, I would urge everyone to place the interests of investors and the SEC above any parochial concerns. In this period of shaken public confidence in the markets, we must act to restore trust, not advance disingenuous arguments.

Congressman Renzi's legislation will help investors get more information about their stockbrokers and their firms. It updates NASD's public disclosure program so that investors can get online access to critical information, but also requires the NASD, subject to SEC approval, to implement appropriate procedures for brokers or others to dispute the accuracy of information disclosure. The corporate scandals of the past year underscore the importance of this legislation. I commend my friend Mr. Renzi for crafting a fine bill.

These two bills advance the Committee's top priority of improving investor confidence and restoring the health of our capital markets. I thank Chairman Baker for his excellent work, and yield back the balance of my time.

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March 6, 2003

Statement of the Honorable Rahm Emanuel
U.S. House of Representatives
Committee on Financial Services
Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises

Mr. Chairman,

I would like to thank you for holding this important hearing on H.R. 658, "the Accountant, Compliance, and Enforcement Staffing Act of 2003" and on H.R. 957, "the Broker Accountability Through Enhanced Transparency Act of 2003." I also appreciate that our distinguished guests from the SEC, NASD and National Employees Treasury Union have taken the time to share their views with us on these topics.

Chairman Baker's bill is a response to concerns raised by the SEC about the lengthy process for hiring accountants, economists and compliance examiners under current competitive hiring rules. This legislation would make all accountant, economist, and securities compliance examiner positions at the SEC "excepted service" positions for the purpose of those rules, just as attorney positions are government-wide. Additionally, the status of current employees in such positions at the SEC would be grandfathered. In the wake of the corporate scandals that led to the Sarbanes-Oxley Act and to substantially increased funding for the SEC, it is critical now that the Commission is able to hire experienced, well-qualified professionals in an expeditious manner.

I do have some concerns, however, any time there is an effort made in the name of urgency to except government employees from civil service protections. Accordingly, I do not support the current language of this bill, but I will support a bill that includes appropriate language that the NTEU and SEC can work out jointly. I know they have had very productive discussions thus far, and I'm confident that any differences will be resolved. The SEC faces many difficult challenges in the months and years ahead, as it deals with ever more complicated corporate tax avoidance schemes, an increased number of corporate filings, and the implementation of Sarbanes-Oxley. We need to be sure that we're not tying the Commission's hands in those efforts. At the same time, exemptions from civil service rules should be drawn as narrowly as possible, so that federal government employees aren't unnecessarily disadvantaged.

H.R. 957 requires the NASD to post the employment and disciplinary histories of registered representatives on the internet, where such information could be directly accessed by investors. This legislation would also provide the NASD with complete immunity (regardless of whether it acted in "good faith") for its actions in implementing this requirement. Pursuant to a 1990 statute, the NASD has been required to maintain a

toll-free telephone line to accept inquiries regarding brokerage firms and its registered representatives. Responses are then mailed to investors. The NASD is exempted from liability for any actions taken in good faith in connection with these activities. However, this statutory authority was granted before the advent of the World Wide Web. The NASD now receives 96% of its requests for information through its internet website. Responses are provided by email or in writing. The NASD does not post complete employment and disciplinary information on its site for fear of lawsuits under the good faith liability exemption. This legislation raises many issues that I believe need to be addressed in greater depth. Specifically, I have concerns about the breadth of the immunity provision. I would also like to hear more about the dispute resolution process contemplated by the NASD, and the protections that will be put in place to ensure a fair process.

Once again, I extend my thanks to Chairman Baker for holding this important hearing, and to the distinguished witnesses who appeared today.

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CAPITAL MARKETS, INSURANCE, AND
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Statement of Congressman Steve Israel
Subcommittee on Capital Markets, Insurance
and Government Sponsored Enterprises
Committee on Financial Services
Hearing on the H.R.658, the "Accountant, Compliance, and Enforcement Staffing Act of 2003" and H.R.957, the "Broker Accountability through Enhanced Transparency Act of 2003"
March 6, 2003, 10:00 a.m.

Mr. Chairman, thank you for holding this hearing today.

After learning of wide-spread accounting fraud in some of our largest corporations, Congress responded by increasing the ability of the Securities and Exchange Commission to deal with these problems. For example, in the Supplemental Appropriations Act last year, the SEC received authority to hire additional lawyers and accountants. Unfortunately, at the start of this year the SEC had failed to secure the services of about 60% of the authorized accountants.

Noting its difficulty in hiring qualified accountants, the SEC has said that the somewhat cumbersome hiring process makes it difficult to screen employees, resulting in the SEC losing applicants to other positions.

Mr. Chairman, all of us want to see the SEC get fully staffed; that is why we provided the additional resources. I am willing to look at proposals to make that easier. But I am not willing to compromise the rights of federal employees to do so.

Thankfully, there seems to be real cooperation going on between the SEC and its employees' representatives. I look forward to hearing about this cooperation and commend both the SEC and the NTEU for working together.

OPENING STATEMENT OF
RANKING DEMOCRATIC MEMBER PAUL E. KANJORSKI

SUBCOMMITTEE ON CAPITAL MARKETS, INSURANCE, AND GOVERNMENT SPONSORED ENTERPRISES

HEARING ON EXPEDITED HIRING AT THE SECURITIES AND EXCHANGE COMMISSION AND ON EXPEDITED ONLINE BROKER DISCLOSURES

THURSDAY, MARCH 6, 2003

Mr. Chairman, thank you for the opportunity to offer my initial thoughts about H.R. 658 and H.R. 957 before we hear from each of our witnesses.

As you know, Mr. Chairman, I have made investor protection one of my top priorities for my work on this committee. As a result, I have regularly supported sensible and well-crafted legislative initiatives designed to advance this goal.

During the last year and only after a series of large-scale corporate scandals, many of my colleagues finally joined me in recognizing the importance of maintaining a strong federal regulator to protect the interests of America's investors. Accordingly, we have significantly augmented the resources available to the Securities and Exchange Commission, including increasing the agency's budget by more than $270 million thus allowing it to hire more than 800 new workers. Unfortunately, the SEC has encountered some difficulties in identifying and hiring the best workers for these new positions, particular in a number of specialized professional fields.

Accordingly, H.R. 658, the Accountant, Compliance and Enforcement Staffing Act, would seek to streamline the hiring process for accountants, compliance examiners, and economists at the SEC, similar to the rules all government agencies use to recruit and hire attorneys. Former SEC Chairman Harvey Pitt suggested this accelerated hiring process for these professionals earlier this year in a letter to Congress.

We will also hear from a witness later today about H.R. 957, the Broker Accountability through Enhanced Transparency Act. This bill seeks to provide investors with easy online access to critical information about securities firms and their brokers. These disclosures would include information on regulatory investigations, disciplinary actions, legal proceedings, and customer complaints. The bill would also give the National Association of Securities Dealers certain legal protections for providing this information over the Internet.

Since Congress required the NASD in 1990 to make such information available to individual investors without charge, this disclosure program has become increasingly popular. Today, the NASD maintains information on more than 665,000 registered securities employees in this automated, electronic system, and in 2002 investors made 2.5 million requests for information about these professionals. The vast majority of these requests were made via the NASD website.

In general, I believe that both H.R. 658, in expediting the hiring of SEC professionals, and H.R. 957, in expediting the access of investors to important information about their brokers and brokerages,

have merit. Nonetheless, I also believe that our panel must answer a number of critical questions before proceeding with any markup on these matters. Moving in haste on legislation could cause multiple unintended consequences.

Regarding H.R. 658, we should, for example, discern how the SEC will ensure a fair hiring process in the absence of the competitive service process requirements. We should also examine how we can protect the civil service status of professionals hired through an expedited process. In my view, we may ultimately identify alternatives to the proposed legislation that achieve the same objective.

With respect to H.R. 957, we must make sure that the information distributed by the NASD about brokers and their firms via the Internet is accurate and proper, allowing individuals to dispute and correct information contained in the database. After all, a broker should not lose customers because they are guilty until proven innocent. The limited liability provisions contained in this bill should also not provide immunity for willful and malicious actions. We must additionally understand how the NASD resolves disputes concerning the information contained in its database.

In closing, Mr. Chairman, I look forward to hearing from our witnesses on these two legislative proposals. I also look forward to working with you to improve these measures in the weeks ahead and encourage you to move forward deliberately on these matters.

STATEMENT OF COLLEEN M. KELLEY
NATIONAL PRESIDENT
NATIONAL TREASURY EMPLOYEES UNION

before the

Committee on Financial Services

U.S. House of Representatives

March, 6, 2003

1750 H Street, N.W. • Washington, D.C. 20006 • (202) 572-5500

STATEMENT OF COLLEEN M. KELLEY
NATIONAL PRESIDENT
NATIONAL TREASURY EMPLOYEES UNION
before the
Committee on Financial Services
U.S. House of Representatives
March, 6, 2003

Good morning Chairman Oxley, Ranking Member Frank and members of the Committee on Financial Services. My name is Colleen M. Kelley and I am the National President of the National Treasury Employees Union (NTEU). NTEU is the exclusive representative of the 2,000 bargaining unit employees at the Securities and Exchange Commission (SEC), including the accountants, examiners and economists. I am pleased and honored to have been invited to testify today on this important legislation. As a professional accountant myself, these employees and their working conditions are near and dear to my heart. I want to note that with me today is Mike Clampitt, President of NTEU Chapter 293, the local union at SEC. Mike is an extraordinary employee leader at SEC and one of the most capable officers of NTEU.

Before I begin, I want to thank Ranking Member Barney Frank who recently was kind enough to address a meeting of NTEU members at the Boston SEC field office. I tried very hard to be at that meeting to welcome Representative Frank but was unable to do so, but I was ably represented by Mike Clampitt. Chairman Oxley, we do not yet have an SEC field office in Ohio (maybe we should) but we would be honored to welcome you to any union meeting at any of the SEC offices.

Mr. Chairman, you know as well as I do of the serious staffing and morale

problems at the Securities and Exchange Commission. For all too many years, this problem went unaddressed. Pay and benefits were grossly substandard, working conditions were miserable and morale was shockingly low. While pay and benefits were the leading reason for this crisis, a GAO study found that it was not the only reason. The study also cited SEC's organizational culture and human capital policies as reasons for poor employee retention. The result was predictable. From 1998 to 2000, one third of the professional staff left the SEC to find work elsewhere.

In fairness, I do not think we can criticize the employees during that period for making the decision to leave the SEC for employment elsewhere. They took the rational course of action in a bad situation. But I believe we must hold in great esteem those employees who, rather than jumping ship, chose to band together and make an effort to improve pay, benefits, working conditions and morale at SEC. The founders and organizers of NTEU Chapter 293 are owed a debt of gratitude for their leadership and vision. They said rather than flee the SEC, let us work together and work with management to make conditions better at SEC and make this agency work for its employees, the investors and the public interest. They took on the serious tasks of improving morale and working conditions at SEC. They worked with you, Chairman Oxley, for the passage of the SEC Pay Parity legislation. They have asked Congress for new funding to implement this legislation and hire a sufficient number of co-workers to share the increased duties of the SEC and they have given employees a voice in the workplace and a means to redress issues and concerns.

None of these jobs are finished. While, under the leadership of this Committee, Pay Parity authorizing legislation has been passed by Congress, we still are in need of full funding by Congress and then full implementation of pay and benefits by SEC management. The need for increased staffing is beginning to be addressed with increased funding last year and hopefully a much greater appropriation when Congress finishes the FY04 Commerce/Justice/State Appropriation. A newly negotiated union contract has given employees confidence that they will be treated fairly on the job.

Mr. Chairman, I am very optimistic that, working together with our partners in SEC management, we will soon begin to see great improvements at SEC. I especially applaud the NTEU members who work at SEC. SEC employees have been exceedingly patient for the day when they can see the light at the end of the tunnel. Their loyalty and commitment deserves commendation. This Committee has also been most diligent in its attention to SEC personnel matters and I thank the Committee for that.

The additional staff being hired at SEC is urgently needed. All who care about the effectiveness of this agency want to see quality candidates hired as quickly as possible. In discussions with your staff, the minority, and SEC management, I think all interested parties are substantially together on this. Let me offer the Committee some observations on how to best approach this matter, based not only on my many years of experience on federal personnel matters but on my observations and interaction with our members at SEC. Hopefully, I can identify an improved route to get to the point that is intended in this legislation.

I believe, Mr. Chairman, that the goals of this proposal can be fully realized without taking away competitive service status from the accountants, economists and examiners at the SEC. The reason I believe we must preserve the competitive service status for these employees is that it provides important advantages and protections for the employees once hired. Dropping these provisions will put SEC at a hiring disadvantage with regard to other federal agencies. Let me outline these items.

For one, keeping competitive service status for these employees is important when applying for positions elsewhere in the federal government. Without it, employees can not count their years of experience at SEC when applying for other government jobs. One of the arguments for pay parity is that the disparity in pay between the SEC and other FIRREA agencies meant that SEC management lost out on the advantage of an exchange of employees among FIRREA agencies. The argument was that such movement of employees was a benefit to the development of experienced, well-rounded professionals. Lacking competitive service status, SEC employees would be at a disadvantage when seeking jobs at FDIC, Treasury or other agencies, resulting in a large recruitment impediment. I also understand that agencies that have had employees moved to excepted service at the agency's request have later regretted this change for this very reason.

Second, excepted service employees have a two year prohibationary period rather than one year. This is a significant amount of time for professionals that typically come

to the SEC with considerable experience in their field. While on probation, such employees can be immediately dismissed or disciplined with very limited rights to challenge or appeal.

Competitive service status is also important for "bump and retreat" rights. I know a Reduction in Force (RIF) at SEC is the last thing on anyone's mind right now but we do not know the path of the future. This is another important right I think could be preserved without any harm to the real goals in this legislation.

Lastly, I believe it is very important that in granting direct hiring authority to SEC, it should be directed to first level positions. Obviously, employee morale would be severely and negatively effected if new hires were brought in at higher graded positions that qualified, existing employees who not given the chance to be placed in these positions. I think we can resolve this point with discussions and agreements between labor and management.

I am convinced that maintaining the competitive service status of SEC accountants, examiners and economists makes these positions more attractive and would draw a higher caliber of applicants, particularly since people working in these crafts would enjoy competitive service status at other FIRREA agencies, which compete with SEC for the best and brightest.

I would suggest, Mr. Chairman, that the better approach would be to keep SEC accountants, examiners and economists in the competitive service, but to look at granting SEC the hiring flexibilities it needs independent of a change in status for the employees. I would suggest that this authority be temporary, given that the motivation for the flexibilities is the current need to staff up SEC and not an on-going growth of these proportions year after year. I would also suggest that in granting the SEC hiring flexibilities, such legislation ask that SEC management report back to the Financial Services Committee in each of the years they have this authority. These reports would be helpful to the Committee in evaluating the usefulness of hiring flexibilities and might well be useful to other government agencies in search of solutions to similar problems.

In electing to focus on hiring flexibilities rather than a total change from Competitive Service to Excepted Service, a model you may wish to look at, Mr. Chairman, is the government wide provisions in the recent Homeland Security legislation that were developed by your fellow Ohioan Senator George Voinovich. The Voinovich provisions, are now part of Public Law 107-296. One provision of the legislation gives the Office of Personnel Management (OPM) the right to grant direct hiring authority to an agency that faces a critical shortage of qualified applicants. The SEC may have concerns about the length of time required to go through an OPM approval process, I would urge this Committee to ensure that SEC follows pre-determined transparent and merit based guidelines for any direct hiring authority granted to SEC. I would also urge that any such authority be temporary and that the SEC provide this and other appropriate Congressional Committees with a report detailing the guidelines used, the numbers, types

and grades of employees hired under the authority and the benefits and shortcoming associated with any change in policy.

Finally I want to again thank the Committee for the opportunity to testify this morning. I would be happy to answer any questions members of the Committee may have.

TESTIMONY
OF
JAMES M. McCONNELL
EXECUTIVE DIRECTOR
U.S. SECURITIES AND EXCHANGE COMMISSION

CONCERNING
H.R. 658, THE "ACCOUNTANT, COMPLIANCE, AND ENFORCEMENT STAFFING ACT OF 2003"

BEFORE THE SUBCOMMITTEE ON CAPITAL MARKETS, INSURANCE, AND GOVERNMENT SPONSORED ENTERPRISES

COMMITTEE ON FINANCIAL SERVICES

U.S. HOUSE OF REPRESENTATIVES

MARCH 6, 2003

U.S. Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Testimony Concerning H.R. 658, the "Accountant, Compliance, and Enforcement Staffing Act of 2003"

by James M. McConnell
Executive Director, U.S. Securities and Exchange Commission

Before the Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises of the House Committee on Financial Services

March 6, 2003

Introduction and Summary

Chairman Baker, Ranking Member Kanjorski and Members of the Subcommittee:

I appreciate the opportunity to testify before you today, on behalf of the Securities and Exchange Commission, in support of H.R. 658, the "Accountant, Compliance, and Enforcement Staffing Act of 2003." This legislation would provide much needed authority to the Commission in its effort to expedite and simplify the hiring of accountants, economists and securities compliance examiners. We thank you, Mr. Chairman, for your leadership on this vital issue. My testimony will focus primarily on the extraordinary challenges facing the Commission in filling these crucial positions, and the steps that we believe are necessary to make this task simpler, faster, more efficient, and thereby more successful. Making these changes will assist the Commission in fully implementing the Sarbanes-Oxley Act as well as executing the rest of the federal securities laws.

Dramatic changes have occurred in the Commission's personnel environment during the past year. Thanks in large part to the efforts of this committee, the Commission has been granted the authority to pay its staff substantially higher salaries, provide additional benefits and has received increases in its appropriations sufficient to fill over 800 new positions. While the new pay authority and higher appropriations funding have greatly eased the Commission's crisis in hiring and retaining attorneys, substantial difficulties still remain in our efforts to hire accountants, economists and securities compliance examiners.

In our experience, the reason for this distinction between attorney hiring and hiring of other Commission professionals is clear: while the hiring of Commission attorneys is excepted from civil service posting and competitive requirements, the hiring of Commission accountants, economists and securities compliance examiners is not. When we are filling a vacancy under competitive service requirements, the process can

take months to complete. Under excepted service authority, the hiring process can be completed in a few weeks' time because hiring officials get to the interview step much more rapidly. Placing Commission accountants, economists and securities compliance examiners in the excepted service will give us the critical tools we need to fill these positions far more quickly, allowing the Commission to meet the challenges of its mission with the full resources that Congress intended.

Background

In January 2002, the Commission received its long sought "pay parity" authority as part of the Investor and Capital Markets Fee Relief Act.[1] This authority allowed us to implement a new pay scale in May 2002 that compensates all Commission employees with salaries commensurate with those paid by other federal financial regulators. It is expected that this authority will help stem the long-term drain of our most talented and experienced staff members. Additionally, in August 2002, as part of the Fiscal Year 2002 Supplemental Appropriations Act,[2] the Commission received a supplemental appropriation of $30.9 million, of which $25 million was earmarked for the purpose of filling 125 additional staff positions.

As expected, the combined effect of these two pieces of legislation has already had a profoundly positive influence on our ability to hire and retain attorneys. Nearly all of the attorney positions funded by last year's Supplemental Appropriations Act have been filled at this time. However, our experience in hiring accountants -- who comprise the bulk of the additional new slots from the supplemental funding -- has been far less successful. So far, despite our best efforts, only a few more than half of the new accountant positions funded with last year's Supplemental Appropriation have been filled. We are greatly concerned that without legislative assistance the struggle to fill positions will only intensify in the future. On February 20, 2003, the President signed into law the Consolidated Appropriations Resolution, providing the Commission with a Fiscal Year 2003 appropriation of $711.7 million, over $273 million more than our Fiscal Year 2002 appropriation.[3] The Commission is expected to use these funds primarily to increase staff by another 700 positions this fiscal year, the majority of which will be accountants, economists and securities compliance examiners.

Specialized Experience Needed

The nature of the Commission's work requires that we seek highly skilled individuals who often are at a point in their careers where they have a number of employment options available to them. Our task is therefore hindered by the slow speed and inflexibility of the competitive service hiring process. We have, time and time again,

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1 Pub. L. No. 107-123, 115 Stat. 2390 (2002).

2 Pub. L. No. 107-206, 116 Stat. 820 (2002).

3 This amount is net of the .65 percent rescission that was enacted as part of the omnibus appropriation ($716.4 million – $4.7 million = $711.7 million).

seen the best applicants for accountant, economist and securities compliance examiner positions snapped up by competitors before the Commission has reached the point in the rigid competitive service hiring process where it can make them an offer. In marked contrast, this rarely happens with attorneys. Simply put, if we want an attorney, we can make them an offer almost as fast as any other employer can.

The Commission's efforts to hire accountants under our existing authority are particularly complicated by the special caliber of accountants that our mission demands. Most other federal agencies hire only a handful of accountants, for the limited purpose of keeping the agency's own books and records. However, in order to perform the complex task of ensuring the adequacy of disclosures by public companies, and to review the books and records of broker-dealers, investment advisers and mutual funds, the Commission must maintain a staff of hundreds of accountants, most of whom must have specialized experience in auditing or preparing the financial statements and reports of public companies. The Commission cannot maintain the high standard of professionalism that the investing public deserves by hiring accountants immediately out of school and expecting them to acquire their skills and experience "on-the-job" at the Commission. The learning curve is too steep, and our workload is too great.

Our difficulties in shepherding experienced, in-demand people in mid-career through the lengthy competitive service applications process are not limited to accountants. The complexity of the issues that Commission staff comes into contact with on a daily basis also mandates a similar level of skill and experience in our economists and securities compliance examiners. Often, the best candidates for securities compliance examiners are those with industry experience. Securities compliance examiners inspect broker-dealers, investment advisers, and mutual funds for compliance with the federal securities laws. There is no substitute for having been on the other side of the fence when it comes to performing effective compliance examinations. As for economists, they analyze the impact of regulations to assist rulemakers in adopting the most cost-effective regulations, as well as assist with enforcement and other administrative tasks of the agency. The work of economists is highly specialized, and there is only a relatively small pool from which to hire in the first instance. Moreover, we must compete not just with the corporate world, but also with think tanks and academia for economists who qualify to do our work.

We believe the solution to these problems is to allow us to hire accountants, economists, and securities compliance examiners as we have successfully hired attorneys for years. We therefore support legislation to grant excepted service status to Commission accountants, economists, and securities compliance examiners.

Hiring Process is Cumbersome and Time-Consuming

The procedures required for hiring under the competitive service system have proven unduly time-consuming and inefficient. A position is usually posted for two weeks, and then several days are allowed to elapse in order to be certain that all applications have arrived in our Office of Administrative and Personnel Management

(OAPM). After OAPM sifts out the obviously incomplete and unqualified applications, a rating panel in the division or office that is seeking to hire must first review and rate qualified applicants, based solely on their written applications. The rating panel in the division is made up of three or more professional staff who are at or above the grade level of the job posted. These professional staff, often managers, must set aside the regular duties of their jobs and spend up to two days at a time rating the applicants' resumes. After the division's work in this phase, the file of applicants goes back to OAPM where, based on the ratings given by the division, staff members check the work of the division, and then send the top three to five candidates back to the division. Then, yet another panel of selecting officials in the division or office may begin the process of setting up interviews with these candidates to determine if one is suitable for hiring.

Beyond the cumbersomeness of the process, managers hiring for these positions have found that the rating process often favors not the best candidates, but those most familiar with how to fill out the relevant application with keywords and phrases used by the various panels in rating the candidates against specified criteria. Also, because the hiring panel only sees the three or five candidates identified by the rating panel, they may never see candidates who are otherwise highly qualified, and perhaps better suited for the job, but who were not rated among the top candidates under the ground rules of the rigid competitive service process. This process, even when it works well, can take several months to complete, but if none of the top ranked candidates proves satisfactory, the position is often reposted and the selection process starts all over again. In contrast, under the excepted service, the hiring panel can simply review all the applications and interview all candidates whom they believed are highly qualified.

Differences Between Excepted and Competitive Service

Most of the civil service protections accorded to excepted and competitive service personnel are exactly the same under the law. These include veteran's preference, bargaining rights and union representation, health care options, EEO rights, and retirement and leave benefits. However, there are several differences in the treatment of employees in the excepted service that we would like to bring to your attention.
First, while certain appeal rights to the Merit System Protection Board are obtained after two years for excepted service employees, compared to one year for competitive service employees, the Commission has historically provided a one-year probationary period for excepted service employees.

Another difference might occur if the agency were experiencing a reduction in force, since mandatory protections are lessened for excepted service employees in a RIF. A RIF is highly unlikely in the out years given our mandate and resources.
Finally, an employee in the excepted service would not have the same advantage as an employee in the competitive service if he or she wanted to transfer to another government agency. We do, however, feel this is a relatively rare issue given that the majority of SEC employees go to the private sector when they leave the agency.

Overall, the differences between excepted and competitive service for our agency come into play in rare or extenuating circumstances, if at all, and thus are far outweighed by our need for relief.

Conclusion

The proposed legislation granting the SEC excepted service authority for certain specialized positions is not unprecedented. Congress has already placed specialized employees of other agencies in the excepted service. For example, Congress has placed health care professionals (including doctors, dentists, and nurses) employed by the Department of Defense in the excepted service, along with Defense intelligence employees, employees in the Office of National Counterintelligence Executive, employees in the Department of Education's Performance-Based Organization for federal student financial assistance, and air traffic controllers hired through the FAA's College Training Initiative Program. Indeed, Congress placed all of the employees of the FBI in the excepted service.

In short, the Commission believes that its needs are significant and extraordinarily time-sensitive—we are trying to fill over 800 positions by the end of this fiscal year and to date have experienced serious difficulties in filling "mission-critical" positions for accountants, economists and securities compliance examiners. Thus, to be competitive in the hiring market, we believe we would greatly benefit from passage of H.R. 658, granting excepted service authority for those positions.

I appreciate the opportunity to share the agency's needs and concerns with you here today, and we look forward to working with you to solve this important problem.

Testimony

of

Doug Shulman

President
Regulatory Services and Operations

Before the
House Financial Services Committee
Subcommittee on Capital Markets

March 6, 2003

NASD

As the world's largest securities self-regulatory organization, NASD has been helping to bring integrity to the markets and confidence to investors for more than 60 years. NASD was established under authority granted by the 1938 Maloney Act Amendments to the Securities Exchange Act of 1934. Every broker/dealer in the U.S. that conducts a securities business with the public is required by law to be a member of NASD. NASD's membership comprises almost 5,400 securities firms that operate in excess of 92,000 branch offices and employ more than 665,000 registered securities professionals.

NASD writes rules that govern the behavior of securities firms, examines them for compliance with NASD rules and the federal securities laws, and disciplines those who fail to comply. Our market integrity responsibilities include regulation; professional training; licensing and registration; investigation and enforcement; dispute resolution; and investor education. We monitor all trading on The Nasdaq Stock Market. We have a staff of 2000 and are governed by a Board of Governors – at least half of whom are unaffiliated with the securities industry.

As part of our mission to protect investors, NASD maintains the qualification, employment, and disciplinary histories of more than 665,000 registered securities employees of member firms through an automated, electronic system. This system, developed by NASD in cooperation with the North American Securities Administrators Association (NASAA), the organization of state securities regulators, is an on-line, Internet-based, registration database and application-processing facility which links federal, state and self-regulatory participants and the securities industry. This system, the Central Registration Depository system, is operated by NASD pursuant to an agreement with NASAA. Policies governing the system are established jointly by NASD and NASAA to ensure that the system meets the requirements of all participating regulators. NASD registration policy is set forth in NASD rules which are subject to SEC review and approval.

Public Disclosure Program and Need for Legislation

Records of securities professionals are available to the public through NASD's Public Disclosure Program. Background information on current registrations and employment experience and disciplinary actions is supplied. Information on disciplinary actions includes disciplinary actions by NASD or any other securities self-regulatory organization and state and federal regulators, reportable criminal convictions and indictments for certain criminal offenses, customer complaints, arbitration decisions, civil judgments in securities or commodities disputes, bankruptcies, and unpaid judgments/liens. This information is provided without charge to individual investors.

Currently, NASD is able to release this information to investors only in response to a written request or through our toll free telephone number. The requisite legal protections do not enable us to extend this information via the Internet in the same manner. If enacted, the Broker Accountability through Enhanced Transparency Act of 2003 would

give us the ability to provide this information to consumers using modern technology not contemplated in the original legislation establishing this system of disclosure.

The bill would also modify current law to conform the level of liability protection accorded to NASD for its other regulatory actions. The present "good faith" language provides a qualified protection standard that is at odds with prevailing federal case law holding there is no private right of action against NASD for acts or omissions taken pursuant to its regulatory responsibilities under the Exchange Act, and that NASD enjoys full liability protection for its regulatory actions.

The change in this language would have the beneficial effect of securing a uniform federal standard. The Central Registration Depository System and the Public Disclosure Program contain information that NASD collects pursuant to federal securities laws and regulations and subject to SEC approval. The current qualified standard subjects NASD to 50 sets of state defamation laws, and 50 possible standards for determining "good faith." The current qualified standard would require NASD to conduct protracted and expensive discovery to prove in each lawsuit that it acted in good faith. By expanding the availability and likely investor use of information disclosed in the Public Disclosure Program, NASD is likely to experience a greater risk of being sued by dissatisfied brokers or investors. The proposed language establishes a uniform federal standard applicable to all 50 states.

The bill will also aid in enhancing the accuracy of records. The proposed amendment protects citizens who dispute their registration records by creating a process for them to challenge and correct their records. This procedural safeguard is not currently required by law, and provides the appropriate protection to brokers and investors.

Public Information Review

Informed investors are critical to market integrity and investor protection. The information that NASD makes publicly available about its regulatory activities and about securities firms and individual brokers plays a key role in informing investors.

Because of the importance of this information to investors and investor confidence, NASD is currently engaged in a broad review of the information it makes public.

A key focus of this review has been on the NASD Public Disclosure Program. We believe that the Public Disclosure Program could become an even better tool for investors. But the critical changes to the Public Disclosure Program, however, require enactment of the statutory amendments proposed in the Broker Accountability through Enhanced Transparency Act of 2003.

Public Disclosure Program Evolution

NASD began its Public Disclosure Program 15 years ago. The Public Disclosure Program has grown tremendously since its introduction. In its first year of operation, 1988, NASD

processed less than 6000 requests for information. Last year, NASD processed just under 2.5 million requests.

The NASD Public Disclosure Program has grown because of keen investor interest in researching the securities firms and brokers that they entrust with their investments. The program's growth, and its contribution to investor protection, has depended on making sure that it meets investor needs for convenience, ease of access, and scope of disclosure. And this service is free to investors.

Advent of the Toll Free Telephone Number

Initially, requests for information had to be submitted to NASD in writing. NASD would then mail the information to the investor. In 1990, with NASD support, Congress mandated a toll-free telephone number (800.289.9999) for investor requests. At the time, this was the easiest and most convenient way to provide information to the general public. Program usage grew substantially with this improvement. Unfortunately, the changes in the law that enabled NASD to release Public Disclosure Program information over the telephone did not contemplate the growth and popularity of consumers accessing information over the Internet.

In 1998, the program again grew dramatically when NASD began to accept requests for information through its Web Site. The Internet is unquestionably the preferred way to access information about securities professionals. Indeed, ninety six percent of requests are made through the NASD Web Site while only four percent are made through the toll-free telephone number created in the 1990 amendments.

The information provided through the NASD Public Disclosure Program has expanded as the program has matured. Information is now available about more than 850,000 brokers and more than 7000 securities firms. This includes over 650,000 active brokers and nearly 200,000 who became inactive within the past two years.

The information provided to investors is drawn from filings made through the Central Registration Depository operated by NASD. As part of the comprehensive registration and licensing regulatory process required by federal and state law, and NASD and other SRO rules, securities firms and brokers must provide detailed information to regulators. This information is collected through filings submitted to the CRD system by securities firms, brokers and regulators using uniform registration forms. Regulators use the information on these filings to determine whether to register or license a firm or broker and for other regulatory purposes.

The reported information falls into two broad categories:

- *Administrative* – information about the types of business a firm engages in, background information about a firm or broker, registrations and licenses held, and other information elicited by the uniform registration forms; and

- *Disclosure* – information about regulatory and disciplinary actions, criminal proceedings, certain civil and financial proceedings and, in the case of brokers, customer complaints and related arbitration or judicial proceedings required by the uniform registration forms.

Administrative information is available online through NASD's Web Site (www.nasd.com) and by phone through the toll-free NASD Public Disclosure Hotline (800-289-9999). To obtain disclosure information, however, an investor must request a written report. These written reports are sent by electronic or regular mail.

Today, the NASD Public Disclosure Program represents the best system currently available to investors for obtaining information about financial services firms and their professional staff. No other industry provides the ease of access and breadth of information about its firms and their professional staff to the public.

What Investors Want

As much as investors use and rely upon and appreciate the Program today, they have been very clear with NASD about how the Public Disclosure Program could be even more useful and responsive to their needs.

Investors want to see three major changes to the Program:

- First, investors want to be able to access all the information available through the Program via the Internet;
- Second, investors want access to as much information as possible about their securities firms and brokers; and
- Third, investors want this information to be presented in a way that is easy to understand and that gives them the option to see a summary of the information or to see it in full detail.

Access to All Information Online

H.R. 957 is essential to meeting these investor needs. Investors show a marked preference for using the Internet to obtain information about their securities firm and broker. Ninety-six percent of all requests made to NASD are now received via the Internet – a percentage that has steadily increased since Internet access was first made available in 1998.

Internet access offers the advantages of around-the-clock availability, clearer presentation of information, access to related information (on the site and through links to other sites), and usage tips and help.

Today, however, because the statute enacted in 1990 did not contemplate the Internet, the information available on NASD's Web Site is limited. The 1990 statute only provides NASD with protection from lawsuits if the disciplinary information we disclose is given out in a written response or through our toll-free telephone number.

NASD is only able to present administrative information online and not able to put disclosure information online. Investors who want to be able to complete their review of a firm's or broker's information must first go to the Web site, locate the administrative information there, request a written report for disclosure information, wait for the disclosure report to come via e-mail or regular mail, and finally review the disclosure information in full when the report is received.

Investors cannot understand why they must suffer this delay and complicated process when the Web sites they use for other purposes (e.g., research, banking, securities transactions, etc.) do not have these limitations.

Facilitating investor access to this information will mean greater transparency, better investor protection and strengthened market integrity.

Access to More Disclosure Information

The NASD Public Disclosure Program currently provides "current" or "reportable" disclosure information to investors. This is information that is required to be reported in response to the disclosure questions on uniform registration forms – including those questions that elicit disciplinary history.

This is a different approach from that taken by the SEC and state regulators. Firms are required to file the Form BD and Form BD/W uniform registration forms with the SEC. The Form U-4 is the Uniform Application for Securities Industry Registration or Transfer. Brokers must file this form to register with NASD and other self-regulatory organizations and to apply for securities agent licenses with the states. Brokers are required to file amendments on Form U4 any time reported information changes. The SEC considers all such forms to be public information available to investors pursuant to the Freedom of Information Act. This information is not available online, however, through the SEC.

Firms and brokers also are required to file uniform registration forms (Form BD and Form BD/W by firms; Form U4 and Form U5 by brokers) with any state in which they are licensed (e.g., any state in which the conduct a securities business). Whether these forms are public depends on applicable state law. Most states consider the forms to be public. Some state statutes (but not all) prohibit disclosure of certain kinds of information (e.g., Social Security number, home address). State information about securities firms and brokers is not generally available online.

As discussed below, the forms are specialized and complex. Most individual investors find them difficult and time consuming to understand. To be useful to investors, information must be drawn from the forms and presented in a clear and understandable manner.

Information that Is Easy to Understand

Understanding the detailed information reported to regulators on uniform registration forms is often a difficult task for individuals who work with this information on a daily basis. It can be even more challenging for the individual investor.

This is borne out in their questions and comments to NASD. Investors also want to be able to view both a summary of the information available on a particular securities firm or broker and to be able to drill down to the details as they choose. Summarizing the information also affords NASD the opportunity to provide context for the information reported. For example, providing information about the percentage of brokers with similar industry experience.

Online disclosure is the tool that can satisfy these investor needs. Familiar Internet techniques of linkages to other Web pages or sites, the ability to view summary and detailed information, at your option, and other tools can make the task of understanding complex information far easier than through the medium of a written report.

Privacy and Fairness

Fundamental privacy interests and protection against identity theft require that some information that brokers are required to submit to regulators when they register should not be made public. This information includes Social Security numbers, home addresses of the securities professionals, and physical descriptions. NASD does not make this information public today and will not make it public in the future.

In addition, while the uniform registration forms require brokers to report details of customer complaints that include the name of the customer, NASD does not release these customer names to the public.

Comprehensive online information about brokers is essential to assisting investors in deciding whether to begin or continue doing business with a broker. This warrants broad disclosure. When, however, a broker is no longer employed by a securities firm or is no longer subject to NASD's jurisdiction, the investor protection rationale for making the information publicly available is attenuated. Accordingly, NASD does not provide information on brokers that are not in the industry and are no longer subject to NASD's jurisdiction.

Since the primary purpose of the Public Disclosure Program is to assist investors in deciding whether to conduct or continue to conduct business with a securities firm or broker, access to the information is provided through an individual firm or broker query approach. An investor must specify the firm or broker that he or she is interested in obtaining information about. The Public Disclosure Program does not and would not provide broad search capabilities that might be used for inappropriate "fishing expeditions."

The uniform registration forms require securities firms to accurately and completely describe various disclosure occurrences. A broker, for example, is required to report the allegations made by a customer in a complaint about the broker conduct. The forms also provide the broker with an opportunity to provide his or her side of the story. The Program includes these broker or firm explanations.

NASD fully supports the other provisions of the bill. These include adopting rules to govern any disputes about the accuracy of Program information, keeping the toll-free number for investors who are not online, providing statutory liability protection for the Public Disclosure Program, and continuing its oversight by the SEC.

H.R. 957

The legislation introduced by Congressman Renzi, Chairman Oxley and Chairman Baker is essential to providing investors with easily accessible information to assist them in becoming informed about the securities firms or brokers that they entrust, or are considering entrusting, with their investments.

Technology and investor preferences and needs have changed since 1990, when the existing legislative provisions governing the Program were enacted.

Online disclosure is the best way to inform investors and it is the approach that they desire.

The bill also:

- Preserves toll-free telephone access for those investors who do not have access to the Internet;
- Allows investors to obtain information about securities firms and brokers that are registered with securities exchanges, but not with NASD;
- Requires SEC approval of the rules governing the Public Disclosure Program, including the scope and process for obtaining information;
- Ensures an SEC-approved process for disputing the accuracy of information reported by NASD;
- Provides appropriate liability protection to NASD for the operation of the Public Disclosure Program, and Is structured to ensure that the standards governing the Public Disclosure Program are uniform across the country and are not subject to the possibility of inconsistent or conflicting court decisions.

Conclusion

Investors want to be able to access all the information available to them via the Internet. They deserve access to as much information as appropriate on their securities firms and brokers, and they deserve that this information be presented in a way that is easy to understand.

If enacted, the Broker Accountability through Enhanced Transparency Act of 2003 would give NASD the ability to provide quick, accessible, one-stop disciplinary information to investors about the securities professionals with whom they trust their money. This would be a major step forward for the values of transparency, investor protection and market integrity that must be at the foundation of rebuilding public confidence in the U.S. capital markets.