IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-30100

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLANT,

v.

J. KENNETH STRINGER, III, ET AL.,
DEFENDANTS-APPELLEES.

On Appeal from the United States District Court
For the District of Oregon
THE HONORABLE ANCER L. HAGGERTY
CHIEF UNITED STATES DISTRICT JUDGE
CG 03-432-HA

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF APPELLEES SEEKING AFFIRMANCE

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Dated: January 29, 2007

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, amicus curiae Washington Legal Foundation hereby states that it is a non-stock, non-profit corporation organized under Section 501(c)(3) of the Internal Revenue Code, and therefore, there are no parent corporations or publicly held corporations that own stock of amicus.

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INTEREST OF AMICUS CURIAE

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center based in Washington, D.C., with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. To that end, WLF has appeared before this and other federal and state courts in numerous cases raising issues relating to securities litigation and criminal law. *See, e.g., Merrill, Lynch, Pierce, Fenner & Smith v. Dabit*, 126 S. Ct. 1503 (2006); *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005); *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336 (2005); *United States v. Booker*, 543 U.S. 220 (2005); *In re Silicon Graphics, Inc. Sec. Litig.*, 183 F.3d 970 (9th Cir. 1999).

WLF is concerned that if the decision below is reversed, individuals' Constitutional rights will continue to be unnecessarily jeopardized or violated in the context of parallel civil and criminal investigations by the Securities and Exchange Commission ("SEC") and the Department of Justice ("DOJ"). WLF's brief will address principally the Due Process and Fifth Amendment issues presented by appellees in their joint brief. Amicus will not address the Due Process right to receive effective assistance of counsel without government

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[1] Pursuant to FRAP 29(a), amicus hereby represents that all parties have consented to the filing of this brief.

interference presented only by appellee Samper in his separate brief, although amicus agrees with his position. WLF has no financial interest in the outcome of this lawsuit.

SUMMARY OF ARGUMENT

The result of the district court's decision below is both fair and simple: the SEC (and other agencies charged with civil enforcement of federal law) will not be allowed to act as a stalking horse for DOJ criminal investigations. The rule announced by the district court is necessary in light of the pervasive practice of civil and criminal investigators coordinating, or even controlling, each others' investigations. Pursuant to the decision below, witnesses appearing before the SEC will be able to make informed decisions about exercising their rights under the Fifth Amendment. The SEC's ability to investigate potential violations of the securities laws will not be compromised; rather, the SEC will now not be permitted to dissemble or mislead witnesses about the existence of a criminal investigation, particularly when asked about it by counsel for the witness. Towards this end, the SEC should disclose whether it has provided information to criminal investigators and, if so, whom the witness should contact in order to obtain more information about any ongoing criminal investigation that may target that witness. For both legal and sound public policy reasons, this Court should uphold the district court's decision.

ARGUMENT

I. *Stringer* is Just One Example of a Pervasive Problem: Individuals' Constitutional Rights are Jeopardized by the Government's Abuse of Parallel Civil and Criminal Investigations.

The situation in which appellees Stringer, Martin, and Samper (hereinafter collectively referred to as "Stringer") found themselves – caught between civil and criminal investigations and forced to make a decision about exercising their constitutionally protected rights in the absence of information about the nature and extent of the criminal investigation of them – is not unique. Federal prosecutors are increasingly using the SEC as a stalking horse to develop information for use in their own criminal investigation, and thereby circumventing the strictures of criminal discovery. *See, e.g.*, *United States v. Scrushy*, 366 F. Supp. 2d 1134 (N.D. Ala. 2005). In *Scrushy*, the district court suppressed the testimony given by the defendant in an SEC deposition because the supposedly parallel investigations of the Unites States Attorney's Office ("USAO") and SEC were in fact a single investigation. *Id.* at 1139. As here, the SEC failed to inform Mr. Scrushy that a criminal investigation was ongoing and that he was a target of that investigation. *Id.* at 1137-38. Also, as here, the court focused on the USAO's significant input in the strategy for eliciting statements from Mr. Scrushy during the SEC's questioning of him. *Id.* at 1139-40. The Court pointed to the USAO's extensive role in preparing the SEC to conduct Mr. Scrushy's interview, an SEC

accountant's taking part in the USAO interviews, and the USAO's suggestion that the SEC conduct the interview in a locale that would provide the USAO with jurisdiction for the criminal case. *Id.* And, as here, the court held that the government's actions "depart[ed] from the proper administration of criminal justice" and granted the defendant's motion to suppress in the criminal trial the testimony he had given before the SEC. *Id.* at 1137.

Complementing the government's efforts to obtain *impermissible* discovery against a putative criminal defendant through the SEC's investigative process are the government's steadfast efforts to then seek to block the defendant's ability to obtain *legitimate* discovery from the SEC after charges have been filed in the parallel proceedings. One court has aptly called this practice "gamesmanship," and other courts have rightfully decried and rejected this practice in similarly forceful terms. *See, e.g.*, *SEC v. Sandifur*, No. C05-1631, 2006 WL 3692611 (W.D. Wash. Dec. 11, 2006); *SEC v. Kornman*, No. 3:04-CV-1803-L, 2006 WL 1506954 (N.D. Tex. May 31, 2006); *SEC v. Saad*, 229 F.R.D. 90 (S.D.N.Y. 2005). In these cases, the government's playbook is strikingly similar: without informing the witness that it is doing so, the government uses a civil investigation to develop evidence supporting criminal charges, brings civil and criminal charges simultaneously, and then moves to stay the civil proceedings in favor of the criminal proceeding, thus ensuring that a defendant will "barely receive any discovery at all." *Saad*, 229

F.R.D. at 91. In *Saad*, the court noted that such a strategy, if unchecked, essentially allows the government to have its cake and eat it too: "[T]he U.S. Attorney's Office, having closely coordinated with the SEC in bringing simultaneous civil and criminal actions against some hapless defendant, ... wish[es] to be relieved of the consequences that will flow if the two actions proceed simultaneously." *Id.* Courts regularly deny stays when "civil regulators have worked directly in concert with the criminal prosecutors during the investigation and the Government has used parallel proceedings to its advantage." *Sandifur*, 2006 WL 3692611, at *2 (citing *Kornman*, 2006 WL 1506954 (N.D. Tex. May 31, 2006); *Saad*, 229 F.R.D. 90 (S.D.N.Y. 2005)). Improper use of parallel proceedings poses threats to an individual's Fifth Amendment rights, expands discovery beyond that allowed under Fed. R. Crim. P. 16(b), and can force the defendant to prematurely reveal the basis of his defense. *See SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1376 (D.C. Cir. 1980).

As the district court suggested below, purported parallel investigations are frequently part of a deliberate, coordinated effort by government agencies to undermine individual Constitutional rights while gaining an unfair advantage in a prospective criminal prosecution. *United States v. Stringer*, 408 F. Supp. 2d 1083,

1088-89 (D. Or. 2006).[2] As occurred in *Stringer*, criminal prosecutors will often attempt to gain a strategic advantage by concealing a criminal investigation behind the guise of an ongoing civil investigation, while actively seeking to leverage the difficult choice facing defendants like Stringer: asserting his Fifth Amendment privilege against self-incrimination or protecting his professional standing and financial interests in the civil or regulatory proceedings, like the SEC investigation involved here. The SEC has increasingly "granted access" to its investigative files to the DOJ, a process that does not require Commission approval and therefore bypasses formal referral procedures.[3]

The problem presented by *Stringer* and the cases cited above is not the existence of parallel investigations or proceedings; it is that the SEC *actively conceals* the existence of such investigations and individuals are forced to make decisions about the exercise of their Fifth Amendment rights in the dark. In

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[2] *See* Ralph C. Ferrara and David A. Garcia, *Meeting in Dark Corners and Strange Places: Scheming Between the SEC and the Department of Justice*, 28 Sec. Reg. & L. Rep. (BNA) 1329, 1330 (2006); Robert G. Morvillo and Robert J. Anello, *Crafting a Defense in the Face of Parallel Proceedings,* 230 N.Y.L.J. 3, 3 (Aug. 5, 2003).

[3] *See* Mark D. Hunter, *SEC/DOJ Parallel Proceedings: Contemplating the Propriety of Recent Judicial Trends,* 68 Mo. L. Rev. 149, 160-161 (2003) (citing 21 Marvin G. Pickholz, *Securities Crimes*, § 1.04(6)(a) (1998)); Steven Amchen, *et al.*, *Securities Fraud*, 39 Am. Crim. L. Rev. 1037, 1093 (2002); Peter H. Morrison, *The Evolution of Criminal Enforcement of the Federal Securities Laws*, 579 PLI/Corp 319, 328-330 (1987).

contrast to DOJ guidelines applicable in similar situations, which require advising a grand jury witness of his rights if the witness is a "target" or "subject" of a grand jury investigation before that witness testifies before a grand jury,[4] the SEC's practice results in a witness giving testimony to the SEC without being so advised, even when the witness is a target or subject and would be notified of that fact were he testifying in a criminal, rather than civil, investigation. The district court's decision does not, as is suggested by the SEC and by the government in their briefs, operate to prevent or even limit the extent to which the SEC and criminal prosecutors can cooperate, coordinate, and share information. It simply requires that the SEC not dissemble or mislead witnesses about the existence of a criminal investigation, particularly when asked about it by counsel for the witness. This will allow a witness to make a fully informed and voluntary decision about how to defend himself.

Corporations are increasingly being required to defend themselves simultaneously on several fronts, responding to criminal investigations, regulatory enforcement actions, and civil suits on the basis of the same alleged misconduct.[5] While parallel criminal and civil cases have always posed a challenge for a

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[4] *See* U.S. Attorney's Manual §9-11.151.

[5] Stanley A. Twardy Jr. & Edgardo Ramos, *Fighting on Several Fronts, Today's White-Collar Crime Defendant May Find Himself Facing Parallel Criminal and Civil Proceedings*, 26 Nat'l L.J. 1, 1 (July 19, 2004).

corporation charged with financial fraud, the increasing prevalence of parallel civil and criminal investigations has significantly increased the risks for both corporations and their employees, who are often asked to sacrifice their individual Constitutional rights in the context of such parallel investigations.[6] As an example, a corporate employee's decision to testify before the SEC will likely be influenced by the fact that an employee may be dismissed from his employment by refusing to cooperate. The coercive impact of the DOJ's Thompson Memo,[7] under which prosecutors routinely (and coercively) require a company to waive attorney-client and work product privileges in order to be viewed as "cooperative" by government investigators, exacerbated these risks. *See United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006) (holding that the certain practices authorized by the Thompson memo violated defendants' Constitutional rights). The government's recent attempt to recover from the scathing holding in *Stein*, in the form of the

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6 *Id.* at 5 (noting that "[c]orporations do not have Fifth Amendment rights, but the invocation of the right by their employees can gravely harm their employers. In today's climate, the decision to assert the privilege is especially important for both the corporation and the employee. If the employee asserts the privilege, the corporation may be constrained to dismiss the employee and stop paying his legal fees in order to maintain its eligibility for cooperation consideration. If the employee does not assert the privilege, he and the corporation could face indictment.")

7 Memorandum by Deputy Attorney General Larry D. Thompson (January 20, 2003) (available at http://www.usdoj.gov/dag/cftf/business_organizations.pdf).

McNulty Memo,[8] does not ameliorate these concerns. The McNulty Memo only adds some procedural requirements to the questionable practice of obtaining privileged information in a criminal investigation.[9]

II. Stringer's Experience Demonstrates that the SEC's Current Practices are Insufficient to Protect Witnesses' Individual Constitutional Rights in the Context of Parallel Investigations.

The district court correctly found that the warnings contained in the SEC's Form 1662 were insufficient to put Stringer on notice that his individual Constitutional rights might be jeopardized by testifying before the SEC. *See Stringer*, 408 F. Supp. 2d at 1088. As such, the government's reliance on SEC Form 1662 for the assertion that the defendants knowingly waived their Fifth Amendment rights is both misplaced and unavailing here.

Buried on page three of a five-page single spaced document in 10-point typeface boilerplate, the current SEC Form 1662 notifies all persons supplying information voluntarily or pursuant to subpoena that the SEC "*often makes* its files available to other government agencies, particularly the United States Attorneys." SEC Form 1662 at 3 (emphasis added), attached hereto as Addendum A (current

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[8] Memorandum by Deputy Attorney General Paul J. McNulty (December 12, 2006) (available at http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf).

[9] *See* Richard Ben-Veniste, *The "McNulty Memo": A Missed Opportunity to Reverse Erosion of Attorney-Client Privilege*, Vol. 22 Legal Backgrounder, Washington Legal Foundation, No. 3 (2007).

form available at http://www.sec.gov/about/forms/sec1662.pdf); *see also* ER 1133-1137 (Ex. 30, Subpoena from Lorraine Echavarria to J. Kenneth Stringer (July 16, 2001) (contains copy of SEC Form 1662 provided to appellee Kenneth Stringer)). SEC Form 1662 also mentions that any information provided by witnesses "may be" used for some twenty-three potential uses, including referral to federal authorities "charged with the responsibility of investigating or prosecuting such [suspected criminal] violation[s]." SEC Form 1662 at 3. Form 1662 thus provides a generic and unremarkable statement of the law: the SEC may share information provided to it in connection with an ongoing civil investigation with criminal investigators, and statements made by witnesses may be used in criminal proceedings.[10] As the facts in *Stringer* demonstrate, however, this so-called warning is both inadequate and often inaccurate, because it fails to inform a witness that a criminal referral *has* already been made or that the SEC is actively assisting a criminal investigation of the witness. Consequently, Form 1662 will often provide witnesses with a false sense of security and distort their calculus of the potential criminal exposure they may face by choosing to waive their Fifth Amendment privilege and provide testimony to the SEC.

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[10] *See* 15 U.S.C. § 77t(b) (section of the Securities Act of 1933 authorizing the SEC to transmit evidence to the Attorney General); 15 U.S.C. § 78u(d)(1) (section of the Securities Exchange Act of 1934 authorizing same).

The record in this case demonstrates the failings of the government's current practices and how Form 1662 is routinely used to elicit statements from witnesses appearing before the SEC without advising them of the serious criminal threats they face. Here, by relying on the "routine uses" warnings contained in Form 1662, the SEC withheld from Stringer the fact that they were repeatedly and consistently identified by the USAO as "targets" or "subjects" of the investigation. *See, e.g.*, ER 1039-40 (Ex. 26, Letter from Gorder, AUSA, to Diana Tani, SEC (June 26, 2000)). The record demonstrates that the SEC was evasive and misleading in responding to the question of whether it was working in conjunction with any other government agencies, such as the USAO. Consequently, the Form 1662 warnings here were factually inaccurate. While Form 1662 states that the SEC "often makes" its files available to criminal prosecutors, and that information given by witnesses "may be used" in criminal proceedings, here, the SEC *actually had* made its files available and knew that the information it sought from Stringer and the other defendants *would be* used in a criminal investigation.

Compounding the problem, the same standard form and warning is provided to any and all witnesses, with no distinction drawn between: (1) those potential defendants for whom criminal referrals have already been made, and (2) those for whom no criminal referrals have been made or criminal prosecution is contemplated. Similarly, the same warnings are given without regard to a

witness's involvement in the matter under investigation: the CEO and the mail room clerk get the same SEC Form 1662 warnings, even though they likely face substantially different risks in providing testimony to the SEC.

In addition to arguing that SEC Form 1662 provides adequate warning for potential defendants such as Stringer, the government and the SEC also cite to an alleged SEC "policy" not to comment on whether the SEC has provided information about their investigation to other government agencies or if it is working in conjunction with other government agencies such as the USAO.[11] *See* Appellants' Br., at 47; SEC Amicus Br., at 6, 12. But, as noted by the Supreme Court, cases involving purported parallel proceedings raise significant concerns about potential violations of individual defendants' Constitutional rights. *United States v. Kordel*, 397 U.S. 1, 12 (1970). As such, the SEC practice of non-disclosure is outweighed by the importance of accurately advising a witness about the risks he or she runs and allowing that witness to make an informed decision about the exercise of his or her Fifth Amendment rights. Here, the SEC's non-responsive answer to a direct question about the USAO's involvement was unacceptable given the USAO's plenary involvement in the SEC investigation.

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[11] As noted in Appellees' Brief at 24, the SEC assertion that it had a "policy" against disclosure was shown, upon inquiry by the district court, not to be so. Amicus finds it ironic, if not outrageous, that the government was even dissembling in court about whether the SEC in fact has a "policy" to dissemble to witnesses and counsel during its investigation.

III. The District Court's Decision Provides Clear Guidance to the SEC Regarding Its Obligation to Tell the Truth and Comply with the Law.

A. The Decision Simply Requires the SEC to Tell the Truth to a Witness About a Criminal Investigation and to Permit Witnesses to Knowingly Exercise Their Fifth Amendment Rights.

The standard articulated by the district court is simple and clear. The holding requires that the SEC not dissemble or mislead witnesses about the existence of a criminal investigation. It does not, as the SEC argues in its amicus brief, inhibit the ability of the SEC to do its job – it simply requires the SEC to conduct itself in a way that does not violate a person's Fifth Amendment rights.

The holding requires the SEC to disclose to a potential witness the facts of which the SEC is aware. That is, if the SEC is aware that a criminal inquiry is ongoing, either from a referral by the SEC or a request for information to the SEC by the DOJ, the SEC must disclose that fact, and, to make that information useful, identify the individual or office to whom a witness's lawyers should direct further questions related to that criminal inquiry.

The holding does not require, as the SEC's brief implies, that the SEC staff maintain current information on the status of any criminal investigation, or take on the responsibilities that the USAO has when it is investigating a person regarding that person's status. All the district court's decision does is require that the SEC, like any other arm of the government, respect the Fifth Amendment rights of the

individuals appearing before it by not lying or dissembling to counsel for the witness.

Under the current practice, defendant Stringer was denied the basic opportunity to assess the potential risks that may arise from testifying and make an informed decision about the exercise and protection of his individual Constitutional rights. Without this information, potential defendants like Stringer may be lulled into not invoking their Fifth Amendment privilege and allow themselves to be swayed by the prospect of occupational and reputational disaster that will almost certainly follow their refusal to testify. Disclosure of a prior criminal referral by the SEC will force a potential defendant to consider the certainty rather than possibility of criminal exposure that may arise from his decision to provide the SEC with compelled testimony.

B. The SEC's Abilities to Enforce the Securities Laws are Not Compromised by the District Court's Decision.

The SEC's argument that its obligation to enforce the securities laws and investigate potential violations will be compromised by the district court's decision is overstated. WLF does not disagree with the importance of the SEC's mandate, but the SEC's argument here that the district court's decision will so adversely affect its ability to discharge those obligations is exaggerated. As discussed below, the SEC will not be foreclosed from pursuing any investigations, and pursuing them in whatever manner it chooses: it simply must disclose the fact of its

coordination with criminal investigators. Furthermore, the SEC's obligation to investigate potential violations of the securities laws giving rise to civil liability does not, as the SEC's brief implies, permit it to hide information from a witness who may be subjecting himself to criminal liability by making statements to SEC staff.

The SEC's brief misreads the district court's decision in two important respects. First, the holding does not require the SEC to disclose "the status of the criminal investigation or how the criminal authorities plan to conduct the investigation." SEC Amicus Br., at 13-14. It only requires that the SEC not dissemble or mislead witnesses about the existence of a criminal investigation. In its brief, the SEC reads far more into the district court's opinion than is actually there, speculating in domino theory fashion about a scenario – not presented by this case – in which SEC staff must provide detailed information, including the current status of a witness as a target or subject, and thereby risk misleading a witness about the nature of the criminal authorities' interest in him. The district court's opinion imposes no such requirements on the SEC staff, and the SEC's fears about whether its own attorneys will be able to understand and comply with the Court's decision provide no basis upon which to reverse the decision.

Second, the SEC complains that the holding will bring cooperation between civil and criminal investigators to a standstill, as criminal investigators will be far

less likely to seek information from civil investigators owing to the disclosure requirements imposed by the holding. This is mere speculation on the SEC's part; even assuming *arguendo* that coordination between civil and criminal investigative agencies becomes more limited, criminal investigative agencies have myriad resources, many of which are far broader than those at the SEC's disposal, to continue to investigate potential criminal behavior. Furthermore, witnesses still may have powerful incentives to testify before the SEC even if the SEC informs the witness of the existence of a criminal probe: avoiding the adverse inference of not testifying,[12] the potential loss of the witness's job, and the potential reputational harm among them. Indeed, it is plausible that the effect of the decision here will have the *opposite* effect to the SEC's prediction: if the SEC has not provided information to criminal investigators, and is aware of no criminal probe, telling a witness those facts may make a witness *more* inclined to testify before the SEC. WLF sees no way in which this would impair the SEC's obligations to enforce the securities laws.

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[12] While adverse inferences may not be drawn against a criminal defendant who asserts his privilege against self-incrimination (*see Carter v. Kentucky*, 450 U.S. 288, 300 (1981)), the Fifth Amendment does not forbid a factfinder from drawing adverse inferences against parties in a civil action when they refuse to testify in response to questions posed to them. *See Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976).

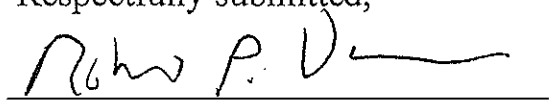
Therefore, the district court's decision should be upheld. It simply requires the SEC to act within the well-established bounds for conduct by a government attorney in protecting an individual's rights under the Fifth Amendment and will not inhibit the SEC's ability to enforce the securities laws.

CONCLUSION

For all of these reasons, WLF respectfully requests that this Court affirm the judgment of the district court.

DATED this 29th day of January, 2007.

Respectfully submitted,



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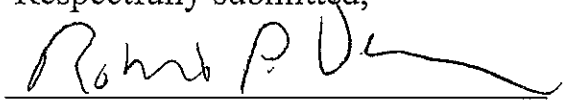
BRIEF FORMAT CERTIFICATION

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 4125 words.

DATED this 29th day of January 2007.

Respectfully submitted,



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Addendum A

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

Supplemental Information for Persons Requested to Supply Information Voluntarily or Directed to Supply Information Pursuant to a Commission Subpoena

False Statements and Documents

Section 1001 of Title 18 of the United States Code provides as follows:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined under this title or imprisoned not more than five years, or both.

Testimony

If your testimony is taken, you should be aware of the following:

1. *Record.* Your testimony will be transcribed by a reporter. If you desire to go off the record, please indicate this to the Commission employee taking your testimony, who will determine whether to grant your request. The reporter will not go off the record at your, or your counsel's, direction.

2. *Counsel.* You have the right to be accompanied, represented and advised by counsel of your choice. Your counsel may advise you before, during and after your testimony; question you briefly at the conclusion of your testimony to clarify any of the answers you give during testimony; and make summary notes during your testimony solely for your use. If you are accompanied by counsel, you may consult privately.

If you are not accompanied by counsel, please advise the Commission employee taking your testimony whenever during your testimony you desire to be accompanied, represented and advised by counsel. Your testimony will be adjourned to afford you the opportunity to arrange to do so.

You may be represented by counsel who also represents other persons involved in the Commission's investigation. This multiple representation, however, presents a potential conflict of interest if one client's interests are or may be adverse to another's. If you are represented by counsel who also represents other persons involved in the investigation, the Commission will assume that you and counsel have discussed and resolved all issues concerning possible conflicts of interest. The choice of counsel, and the responsibility for that choice, is yours.

3. *Transcript Availability.* Rule 6 of the Commission's Rules Relating to Investigations, 17 CFR 203.6, states:

> A person who has submitted documentary evidence or testimony in a formal investigative proceeding shall be entitled, upon written request, to procure a copy of his documentary evidence or a transcript of his testimony on payment of the appropriate fees: *Provided, however,* That in a nonpublic formal investigative proceeding the Commission may for good cause deny such request. In any event, any witness, upon proper identification, shall have the right to inspect the official transcript of the witness' own testimony.

If you wish to purchase a copy of the transcript of your testimony, the reporter will provide you with a copy of the appropriate form. Persons requested to supply information voluntarily will be allowed the rights provided by this rule.

4. *Perjury.* Section 1621 of Title 18 of the United States Code provides as follows:

> Whoever . . . having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly .... willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true... is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years or both . . . .

5. *Fifth Amendment and Voluntary Testimony.* Information you give may be used against you in any federal, state, local or foreign administrative, civil or criminal proceeding brought by the Commission or any other agency.

You may refuse, in accordance with the rights guaranteed to you by the Fifth Amendment to the Constitution of the United States, to give any information that may tend to incriminate you or subject you to fine, penalty or forfeiture.

If your testimony is not pursuant to subpoena, your appearance to testify is voluntary, you need not answer any question, and you may leave whenever you wish. Your cooperation is, however, appreciated.

6. *Formal Order Availability.* If the Commission has issued a formal order of investigation, it will be shown to you during your testimony, at your request. If you desire a copy of the formal order, please make your request in writing.

Submissions and Settlements

Rule 5(c) of the Commission's Rules on Informal and Other Procedures, 17 CFR 202.5(c), states:

> Persons who become involved in . . . investigations may, on their own initiative, submit a written statement to the Commission setting forth their interests and position in regard to the subject matter of the investigation. Upon request, the staff, in its discretion, may advise such persons of the general nature of the investigation, including the indicated violations as they pertain to them, and the amount of time that may be available for preparing and submitting a statement prior to the presentation of a staff recommendation to the Commission for the commencement of an administrative or injunction proceeding. Submissions by interested persons should be forwarded to the appropriate Division Director, Regional Director, or District Administrator with a copy to the staff members conducting the investigation and should be clearly referenced to the specific investigation to which they relate. In the event a recommendation for the commencement of an enforcement proceeding is presented by the staff, any submissions by interested persons will be forwarded to the Commission in conjunction with the staff memorandum.

The staff of the Commission routinely seeks to introduce submissions made pursuant to Rule 5(c) as evidence in Commission enforcement proceedings, when the staff deems appropriate.

Rule 5(f) of the Commission's Rules on Informal and Other Procedures, 17 CFR 202.5(f), states:

> In the course of the Commission's investigations, civil lawsuits, and administrative proceedings, the staff, with appropriate authorization, may discuss with persons involved the disposition of such matters by consent, by settlement, or in some other manner. It is the policy of the Commission, however, that the disposition of any such matter may not, expressly or impliedly, extend to any criminal charges that have been, or may be, brought against any such person or any recommendation with respect thereto. Accordingly, any person involved in an enforcement matter before the Commission who consents, or agrees to consent, to any judgment or order does so solely for the purpose of resolving the claims against him in that investigative, civil, or administrative matter and not for the purpose of resolving any criminal charges that have been, or might be, brought against him. This policy reflects the fact that neither the Commission nor its staff has the authority or responsibility for instituting, conducting, settling, or otherwise disposing of criminal proceedings. That authority and responsibility are vested in the Attorney General and representatives of the Department of Justice.

Freedom of Information Act

The Freedom of Information Act, 5 U.S.C. 552 (the "FOIA"), generally provides for disclosure of information to the public. Rule 83 of the Commission's Rules on Information and Requests, 17 CFR 200.83, provides a procedure by which a person can make a written request that information submitted to the Commission not be disclosed under the FOIA. That rule states that no determination as to the validity of such a request will be made until a request for disclosure of the information under the FOIA is received. Accordingly, no response to a request that information not be disclosed under the FOIA is necessary or will be given until a request for disclosure under the FOIA is received. If you desire an acknowledgment of receipt of your written request that information not be disclosed under the FOIA, please provide a duplicate request, together with a stamped, self-addressed envelope.

Authority for Solicitation of Information

Persons Directed to Supply Information Pursuant to Subpoena. The authority for requiring production of information is set forth in the subpoena. Disclosure of the information to the Commission is mandatory, subject to the valid assertion of any legal right or privilege you might have.

Persons Requested to Supply Information Voluntarily. One or more of the following provisions authorizes the Commission to solicit the information requested: Sections 19 and/or 20 of the Securities Act of 1933; Section 21 of the Securities Exchange Act of 1934; Section 321 of the Trust Indenture Act of 1939; Section 42 of the Investment Company Act of 1940; Section 209

of the Investment Advisers Act of 1940; and 17 CFR 202.5. Disclosure of the requested information to the Commission is voluntary on your part.

Effect of Not Supplying Information

Persons Directed to Supply Information Pursuant to Subpoena. If you fail to comply with the subpoena, the Commission may seek a court order requiring you to do so. If such an order is obtained and you thereafter fail to supply the information, you may be subject to civil and/or criminal sanctions for contempt of court. In addition, if the subpoena was issued pursuant to the Securities Exchange Act of 1934, the Investment Company Act of 1940, and/or the Investment Advisers Act of 1940, and if you, without just cause, fail or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, correspondence, memoranda, and other records in compliance with the subpoena, you may be found guilty of a misdemeanor and fined not more than $1,000 or imprisoned for a term of not more than one year, or both.

Persons Requested to Supply Information Voluntarily. There are no direct sanctions and thus no direct effects for failing to provide all or any part of the requested information.

Principal Uses of Information

The Commission's principal purpose in soliciting the information is to gather facts in order to determine whether any person has violated, is violating, or is about to violate any provision of the federal securities laws or rules for which the Commission has enforcement authority, such as rules of securities exchanges and the rules of the Municipal Securities Rulemaking Board. Facts developed may, however, constitute violations of other laws or rules. Information provided may be used in Commission and other agency enforcement proceedings. Unless the Commission or its staff explicitly agrees to the contrary in writing, you should not assume that the Commission or its staff acquiesces in, accedes to, or concurs or agrees with, any position, condition, request, reservation of right, understanding, or any other statement that purports, or may be deemed, to be or to reflect a limitation upon the Commission's receipt, use, disposition, transfer, or retention, in accordance with applicable law, of information provided.

Routine Uses of Information

The Commission often makes its files available to other governmental agencies, particularly United States Attorneys and state prosecutors. There is a likelihood that information supplied by you will be made available to such agencies where appropriate. Whether or not the Commission makes its files available to other governmental agencies is, in general, a confidential matter between the Commission and such other governmental agencies.

Set forth below is a list of the routine uses which may be made of the information furnished.

1. To coordinate law enforcement activities between the SEC and other federal, state, local or foreign law enforcement agencies, securities self-regulatory organizations, and foreign securities authorities.

2. By SEC personnel for purposes of investigating possible violations of, or to conduct investigations authorized by, the federal securities laws.

3. Where there is an indication of a violation or potential violation of law, whether civil, criminal or regulatory in nature, and whether arising by general statute or particular program statute, or by regulation, rule or order issued pursuant thereto, the relevant records in the system of records may be referred to the appropriate agency, whether federal, state, or local, a foreign governmental authority or foreign securities authority, or a securities self-regulatory organization charged with the responsibility of investigating or prosecuting such violation or charged with enforcing or implementing the statute or rule, regulation or order issued pursuant thereto.

4. In any proceeding where the federal securities laws are in issue or in which the Commission, or past or present members of its staff, is a party or otherwise involved in an official capacity.

5. To a federal, state, local or foreign governmental authority or foreign securities authority maintaining civil, criminal or other relevant enforcement information or other pertinent information, such as current licenses, if necessary to obtain information relevant to an agency decision concerning the hiring or retention of an employee, the issuance of a security clearance, the letting of a contract, or the issuance of a license, grant or other benefit.

6. To a federal, state, local or foreign governmental authority or foreign securities authority, in response to its request, in connection with the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant or other benefit by the requesting agency, to the extent that the information is relevant and necessary to the requesting agency's decision on the matter.

7. In connection with proceedings by the Commission pursuant to Rule 102(e) of its Rules of Practice, 17 CFR 201.102(e).

8. When considered appropriate, records in this system may be disclosed to a bar association, the American Institute of Certified Public Accountants, a state accountancy board or other federal, state, local or foreign licensing or oversight authority, foreign securities authority, or professional association or self-regulatory authority performing similar functions, for possible disciplinary or other action.

9. In connection with investigations or disciplinary proceedings by a state securities regulatory authority, a foreign securities authority, or by a self-regulatory organization involving one or more of its members.

10. As a data source for management information for production of summary descriptive statistics and analytical studies in support of the function for which the records are collected and maintained or for related personnel management functions or manpower studies, and to respond to general requests for statistical information (without personal identification of individuals) under the Freedom of Information Act or to locate specific individuals for personnel research or other personnel management functions.

11. In connection with their regulatory and enforcement responsibilities mandated by the federal securities laws (as defined in Section 3(a)(47) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a)(47)), or state or foreign laws regulating securities or other related matters, records may be disclosed to national securities associations that are registered with the Commission, the Municipal Securities Rulemaking Board, the Securities Investor Protection Corporation, the federal banking authorities, including but not limited to, the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, and the Federal Deposit Insurance Corporation, state securities regulatory or law enforcement agencies or organizations, or regulatory law enforcement agencies of a foreign government, or foreign securities authority.

12. To any trustee, receiver, master, special counsel, or other individual or entity that is appointed by a court of competent jurisdiction or as a result of an agreement between the parties in connection with litigation or administrative proceedings involving allegations of violations of the federal securities laws (as defined in Section 3(a)(47) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a)(47)) or the Commission's Rules of Practice, 17 CFR 202.100-900, or otherwise, where such trustee, receiver, master, special counsel or other individual or entity is specifically designated to perform particular functions with respect to, or as a result of, the pending action or proceeding or in connection with the administration and enforcement by the Commission of the federal securities laws or the Commission's Rules of Practice.

13. To any persons during the course of any inquiry or investigation conducted by the Commission's staff, or in connection with civil litigation, if the staff has reason to believe that the person to whom the record is disclosed may have further information about the matters related therein, and those matters appeared to be relevant at the time to the subject matter of the inquiry.

14. To any person with whom the Commission contracts to reproduce, by typing, photocopy or other means, any record within this system for use by the Commission and its staff in connection with their official duties or to any person who is utilized by the Commission to perform clerical or stenographic functions relating to the official business of the Commission.

15. Inclusion in reports published by the Commission pursuant to authority granted in the federal securities laws (as defined in Section 3(a)(47) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a)(47)).

16. To members of advisory committees that are created by the Commission or by the Congress to render advice and recommendations to the Commission or to the Congress, to be used solely in connection with their official designated functions.

17. To any person who is or has agreed to be subject to the Commission's Rules of Conduct, 17 CFR 200.735-1 to 735-18, and who assists in the investigation by the Commission of possible violations of federal securities laws (as defined in Section 3(a)(47) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a)(47)), in the preparation or conduct of enforcement actions brought by the Commission for such violations, or otherwise in connection with the Commission's enforcement or regulatory functions under the federal securities laws.

18. Disclosure may be made to a Congressional office from the record of an individual in response to an inquiry from the Congressional office made at the request of that individual.

19. To respond to inquiries from Members of Congress, the press and the public which relate to specific matters that the Commission has investigated and to matters under the Commission's jurisdiction.

20. To prepare and publish information relating to violations of the federal securities laws as provided in 15 U.S.C. 78c(a)(47)), as amended.

21. To respond to subpoenas in any litigation or other proceeding.

22. To a trustee in bankruptcy.

23. To any governmental agency, governmental or private collection agent, consumer reporting agency or commercial reporting agency, governmental or private employer of a debtor, or any other person, for collection, including collection by administrative offset, federal salary offset, tax refund offset, or administrative wage garnishment, of amounts owed as a result of Commission civil or administrative proceedings.

Small Business Owners: The SEC always welcomes comments on how it can better assist small businesses. If you have comments about the SEC's enforcement of the securities laws, please contact the Office of Chief Counsel in the SEC's Division of Enforcement at 202-942-4530 or the SEC's Small Business Ombudsman at 202-942-2950. If you would prefer to comment to someone outside of the SEC, you can contact the Small Business Regulatory Enforcement Ombudsman at http://www.sba.gov/ombudsman or toll free at 888-REG-FAIR. The Ombudsman's office receives comments from small businesses and annually evaluates federal agency enforcement activities for their responsiveness to the special needs of small business.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two (2) copies of the foregoing Amicus Curiae Brief of Washington Legal Foundation were served via Federal Express this 29th day of January 2007 upon the following:

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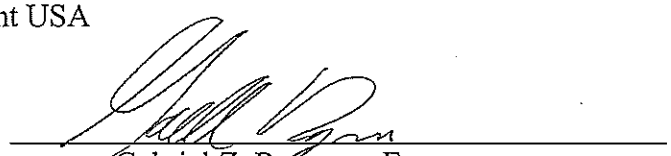

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