**Retirement Remarks**

Now what you have all come here for. To hear some final words from Jim Kidney. Emphasis on FINAL.

I originally planned this to start at noon so I could give a four hour speech getting even. But sadly, it is not to be. I went through my grudge notebooks – see, this one is **Keeping Score at the SEC – Volume 11.** But to my astonishment, I had to empty the notebooks. The notes were useless. The revolving door at the SEC spits people out so fast that they are gone before you can get retribution!!!

It's my own fault that my career here has been so filled with frustration. There are three major reasons for my misanthropy at the SEC. They are the bureaucracy, the incredible over pleading of minutiae and picking on the little guys. I should have known these weaknesses from even before I was officially on board at the Commission in 1986.

Tom Newkirk hired me to the trial unit – I have never been promoted. I remember him telling me that "We've got a really great case for you. I'd take it myself if I were not so busy." I later found out Newkirk said that about every case. He said the Division had gotten special

consent from the Commission to let me have the action memo early, before I had even actually started, so I could get up to speed. Great. Top secret access. Exciting.

I had no idea what an action memo was. For those of you I have invited who never have worked at the Commission – otherwise known as my real friends, both of you – an action memo is just what it says. In order to take any action at the Commission, you need to first write a memo. It explains a lot.

Newkirk gave me what I thought was the training manual for the entire SEC, but it turned out to be the 48-page single-spaced action memo for something called In re D.S. I took it home and started to read it. Immediately I felt that strange combination of fear and ennui that occurs when you realize you have made what might be a fatal career mistake.

There were two claims for fraud, referenced as sections 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934. That was plenty weird. Two kinds of fraud. Did they overlook one in 1933, or had someone developed something new between 1933 and 1934? Plus, this was 1986. Why was it still important to state the year of this legislation? Outsiders, believe me, it still is. No one says "the Securities Act." It is "the Securities Act of 1933." There are no other securities acts named just that in federal law. Only

the one in 1933. But we still give its birth date every time. The first SEC chairman, Joe Kennedy, did. It's too soon to change.

But, at least that was pleading fraud. That sounded serious. But that wasn't enough. The 48 single spaced pages went on to identify violations of the net capital rule, the suitability rules, the shingle theory, excessive markups, books and records, and use of unqualified managers. It had a claim that D.S. recited false quotations, attributing quotes from Milton to Shakespeare. There were violations of something called the MSRB rules, which I assumed meant Making Statements that Were Rude and Bombastic. I think that there were alleged violations of New York's Sullivan Act, the West Virginia hunting regulations and the Texas sodomy laws – still in effect at that time. I had spent 10 years as an antitrust lawyer and these claims sounded way too complex for me – both frightening and quite boring, except maybe the sodomy part.

I of course began reconsidering if the SEC was the place for me. It seemed to be a place that picked a weak and dubious target, found some violations, and didn't know when to stop. Sound familiar?

So I knew from the start about how the SEC staff went about meeting its stat quotas. After 25 years of additional experience, I now consider the D.S. case to be an example of staff moderation.

But the best was yet to come. My first experience with the bureaucracy itself. Newkirk did not have a real office for me to occupy. It was August. Newkirk said I was to treat this document cart sitting before you as my office. I would go to the offices that were vacant when staff was on leave. Now remember, I had a single spaced 48 page complaint to litigate. The D.S. case had lots of documentary proof. This was before desktop computers. The proof was all paper. Each day I received several more grosses of paper to prove the fraud, the firearms violations and the misattributions of Milton. I had no file cabinet. I had only this document cart. I was the Flying Dutchman of the Division of Enforcement, moving week-to-week and sometimes day-to-day with my cart, as my cart kept holding more and more and more documents.

"Please Mr. Newkirk, an office please." I begged. I was a 39-year-old man begging for a place to put my hat.

"No!" Newkirk said. "Go back to your cart."

Until, one day, the cart just broke. The bolts all failed. The cart fell to the ground. It was in revolt.

They got me a new cart.

Finally, somebody quit. I got an inside office. The cart was retired. I should have, too.

So it is my own fault for spending all these years here. I was warned from Day One.

In truth, it has been mostly a fun ride. And I have been privileged to work with very talented and often dedicated people, who, like me, are true believers that the SEC can be a strong public protector in the securities market, and that one can work for the Commission one's entire career proud of your own work, if not always of the Commission itself. With perhaps a little help from a working spouse, you also can feed and educate your family and lead a decent, if not lavish, lifestyle.

The revolving door is a very serious problem. I have had bosses, and bosses of my bosses, whose names we all know, who made little secret that they were here to punch their ticket. They mouthed serious regard for the mission of the Commission, but their actions were tentative and fearful in many instances. You can get back to Wall Street by acting tough, by using the SEC publicity apparatus to promote yourself as tough, and maybe even on a few

occasions being tough, if you pick your targets carefully. But don't appear to fail. Don't take risks where risk would count. That is not the intended message from the ticket punchers, of course, but it is the one I got on the occasions when I was involved in a high profile case or two. The revolving door doesn't push the agency's enforcement envelope very often or very far.

The attitude trickles down the ranks. Combined with the negative views of the civil service promoted by politicians and the beatings we take from the public, it is no surprise that we lose our best and brightest as they see no place to go in the agency and eventually decide they are just going to get their own ticket to a law firm or corporate job punched. They see an agency that polices the broken windows on the street level and rarely goes to the penthouse floors. On the rare occasions when Enforcement does go to the penthouse, good manners are paramount. Tough enforcement – risky enforcement – is subject to extensive negotiation and weakening.

We need to get and keep at all ranks people who believe in the mission of this agency, believe in afflicting the comfortable and powerful, and are willing to put their time in. Those people are becoming quite scarce. Their absence over the years has been seen in the floundering, unfocused, ineffective -- but heavily promoted -- results. For the powerful, we are at most a tollbooth on the bankster turnpike. We are a cost, not a serious expense.

The only other item I want to be serious about, besides some personal observations in a minute, is the metric of the division of enforcement: number of cases brought. It is a cancer. It should be changed. I have suggested to our higher ups on several occasions starting a discussion about factors we – after Monday, you -- should weigh in evaluating investigations to be sure our resources are being well-spent and properly distributed. It has gone nowhere. One argument against change is that the press and congress are welded to our own anvil. But I submit that there are not more than a dozen reporters who matter covering the Commission, and about the same number of Hill staffers. I imagine they would welcome coming to an educational event about the Division's new metric, one which focuses on quality, not quantity. Who could be against it? Goodness knows we spend millions promoting even our emptiest achievements. Why not promote a new metric that will be sensible and helpful. Current management of the Division would either adjust or leave.

Please don't tell me we account for other factors in our management of cases. We think about them, of course, but we all see cases frequently to which we offer a head scratching response. Really? The SEC spent time and money on that? These cases have no significant impact and the conduct is of minimal or no harm to the investing public. But the investigation

has been intense and expensive. Could no one in management exercise judgment and call the investigation to a halt? Of course not! Bringing the case is a stat!

The metric we have now is built into the soul of the Division. It has to be removed root and branch.

And adding salt to the wound, I saw on Tuesday on one of those hallway screens we have now at the home office showing a slide promoting how the SEC now goes after defendants in China, India and, for all I know, Moldavia and other obscure nations. My question: Are we so sure that our own domestic corporations and audit firms are law abiding that we can spend vast quantities of staff time and taxpayer money worrying about firms in other countries because a handful of ADRs are sold on U.S. markets? Are we so paralyzed by the organizational stovepipes we have created and made more and more of that we can't flood the zone on important cases instead? Do we have to preserve bureaucratic organizational boundaries by sweating the minutiae just so each organizational unit can claim to have enough to do to protect some manager's turf? When a case against an Indian corporation which likely will default or settle for a meaningless (in India) "sin no more" injunction is as important as one against a Wall

Street giant, and I know for a fact that in some instances way more is spent on the lesser case, there is a problem with our management. It has been going on a long time. It should stop.

So that's it. We have great staff. We should better use them and encourage them.

Despite these program and policy failures, on a personal level I could not have asked for a better employer than the Division or for kinder colleagues. Don't mistake my criticisms of the institution for a personal criticism of its staff. Working with the staff on litigated cases has been fun. There is great talent and even better people on the staff. It is tragic to waste them, as we sometimes do. And to my colleagues in the trial unit – have a little understanding. The system is broken. The staff has to work with it. Lighten up on them. They are like refugees from the Crimea. Be kind.

I would like to name many people with whom I have worked who I both love and respect. But I am sure I would inadvertently leave some out. I hope you know who you are. Has there been friction sometimes? Well, sure. But that's the nature of litigation and teamwork under pressure. Has it ever been destructive on my cases? I hope not. That never was my intention.

I will always bleed SEC blue and be following Commission and Division activities closely, if from afar. In the meantime, there was line in the obituary of Sherwin Nuland a couple

weeks ago. He was a doctor who wrote books like "How We Die." He, in turn, attributed it to the Jewish philosopher Philo of Alexandria (with who I am sure all of you are familiar). It is something to remember as you fight the bureaucratic and legal battles at the SEC:

"Be kind, for everyone you meet is fighting a great battle."

Godspeed and good luck.