OPENING STATEMENT OF
RANKING DEMOCRATIC MEMBER PAUL E. KANJORSKI

SUBCOMMITTEE ON CAPITAL MARKETS, INSURANCE, AND GOVERNMENT SPONSORED ENTERPRISES

HEARING ON THE ROLE OF ATTORNEYS IN CORPORATE GOVERNANCE

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Mr. Chairman, we adopted the Sarbanes-Oxley Act during the last Congress after a rash of corporate scandals. This statute modified the regulation of auditors, business executives, corporate boards and research analysts. A key section of this law also revised the oversight of attorneys in our capital markets. This part of the law and its related pending regulatory proceedings at the Securities and Exchange Commission are the focus of today's hearing.

The regulatory system for our capital markets depends in large part on the effectiveness of a variety of independent gatekeepers. These skilled professionals include the lawyers and accountants who verify and analyze the disclosures and documents of publicly held companies. These experts, from my perspective, have a special obligation to behave ethically and follow the law. Professionals like lawyers also have a responsibility to police themselves. If, however, such professionals fail to effectively monitor their actions and those of their peers, we have an obligation to protect investors by taking action in Washington.

After examining the corporate scandals at Enron, WorldCom and other companies, we ultimately determined that securities lawyers played a role in these debacles and decided to alter the rules governing the profession. One year ago, the Securities and Exchange Commission adopted a regulation to implement the reforms affecting securities attorneys mandated by the Sarbanes-Oxley Act. This rule requires lawyers to report "up the ladder" evidence of material wrongdoing to a company's officers and, if necessary, a company's board. This regulation, which I strongly support, became effective last August.

When adopting the rule governing the professional responsibilities of securities lawyers, the Commission also extended the public comment period on a proposal to require a "noisy withdrawal" by attorneys who do not receive a satisfactory response from a company to internal reports of wrongdoing. This plan to require the notification by the attorney to the Commission of his or her withdrawal immediately met with strong opposition from many practitioners in the legal community. In response, the Commission put forward for review an alternative plan. This substitute would require the issuer, rather than the attorney, to report the withdrawal of a lawyer for professional reasons.

The two withdrawal-and-notification proposals presently pending before the Securities and Exchange Commission raise important questions that we should carefully examine today. Each one has the potential to alter the attorney-client privilege and could have a chilling effect on communications between management and counsel, making executives less likely to consult and speak frankly with lawyers. These proposals might also unintentionally reward those lawyers with lower ethical standards who would stretch the law beyond its reasonable interpretations and never withdraw from a client. We should closely examine each of these concerns.

In their observations today, I also hope that our distinguished witnesses will answer a question that I have about restoring the ability of victims of securities fraud to sue those who aid

and abet issuers in defrauding the public. Prior to a 1994 decision by the Supreme Court, individuals had the right to pursue a private cause of action against lawyers and other professionals who helped public corporations to deceive the public.

Although we partially overturned this decision when passing the Private Securities Litigation Reform Act of 1995 to allow the Commission under certain circumstances to bring cases against aiders and abettors of securities fraud, we may have failed to do enough to protect investors. After all, past leaders of the Securities and Exchange Commission from both political parties have stressed the integral role of private lawsuits in maintaining investor confidence.

Since 1994, however, the victims of securities fraud have been unable to bring claims against lawyers and other gatekeepers who abuse the public trust by aiding issuers in misleading shareholders. Rather than adopting either one of the pending alternatives for reporting an attorney's withdrawal from representation because of concerns about the client's potential or actual wrongdoing, it may make sense for the Congress to instead restore the right of individuals to pursue their legal claims in our courts.

In closing, Mr. Chairman, I commend you again for your sustained leadership in studying these matters. This timely hearing will help us to better appreciate the decisions facing the Commission as it continues its work to bolster investor confidence, restore the integrity of financial statements, and rebuild trust in our securities markets.
