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Symposium on Federal Government Simplification Experiences

The Securities and Exchange Commission Simplification Experience

Martin Dunn*

I. Need for Simplification

I joined the simplification project at the Commission only in recent years, after it had been ongoing for some time. I actually found a quote from 1937 where the Head of the Division of Corporation Finance (at the time it was called Disclosure and Markets) complained about the lack of clarity in the writing. The documents were unclear and missed the point with too many words. The Commission eventually wound up with a rule that said your prospectus has to be clear, concise and understandable.

As you know, that worked extremely well. We ended up with 400 page prospectuses and 500 word introductory sentences to a description of a merger that is supposed to be understandable to my aunt in Annapolis. It has (insert number) defined terms, and eight different cross-references. I am certain that type of writing is unhelpful to everybody.

Later, when Arthur Levitt became chairman, he had to divest a few things because he had an obviously very successful life before working with the Commission. In reading all of the documents describing what he owned, he realized that a lot of them were incomprehensible. Accordingly, one of the first things he did when he got to the Commission was to tell us that we were going to change that. That was not easy because we also fancied ourselves very bright at the Commission. We initially thought since we can

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understand it, why can't everybody else? However, when we sat back and thought about it, we realized we were probably wrong. We eventually did change. How we went about doing it is very instructive for everybody.

II. Reactions to Simplification Recommendation

When you start telling people to write clearly they are going to do two things. One, they are going to make a lot of comments to make you sound like the village idiot. Two, they are going to say "I already write clearly; don't tell me what the hell to do." These are natural reactions.

I was the chief counsel at Corporation Finance for years when this started. They told me I had to write my "no action" letters in plain English. My answer was very clear, "People understand what these things mean and if they don't then they shouldn't be doing this." I thought that was all well and good until it was pointed out to me by the people I worked for that it was not the right answer. I then decided "I'll try this." The result is that the "no action" letters right now are 100 percent clearer. I used to write "one sentence" extremely long "no action" letters. That will never happen again. Hopefully, they are clearer. Hopefully, there are less tea leaves to read. That is what we are after. So internally we had to buy into "simplification."

III. Pilot Demonstration Program

We then had to get people at the law firms to buy into simplification. They had an even stronger view that they were writing it exactly right. We started what we called the *Pilot Program* because we had to show people it could be done. We actually went to folks and started sitting down with them and drafting their disclosure documents with them, questioning every sentence they wrote. The people who volunteered for this deserve great credit. They were very brave about it. Nobody volunteers for anything without some advantage accruing. We therefore promised we would do their documents very quickly when we got them. There is the trade-off. You have got to give to get. We started getting documents together to show people it could be done.

IV. Getting Lawyers to Use Simplification Techniques

The second phase is to get the lawyers to use the simplification techniques. Securities lawyers are not the most creative lot. They are not out there to do creative writing. Their perspective is they

are there to do something quickly because they have got a deal to get done. Accordingly, we needed to put examples out there to say, "See, this worked in this context. Take it and turn it into yours. Don't use the same words because it's not going to apply, but see this worked, you can do this." We started building this critical mass and over the course of about a year we put together the proposed rules. These rules are basic, fairly straightforward plain English kind of rules. The same words are all over the place—active voice, short sentences, captions where you can, no double negatives, don't copy things directly out of documents—and it is in Rule 421, 17 C.F.R. 230.421 if you ever want to look at it. This is basic stuff. It is the actual application that is harder.

We put the rule out. We realized that if people did not want to do it, we could not do it. So we embarked on a campaign to set the rules. We visited the law firms. I did about sixty of these over the course of four months. (My wife and children were thrilled.) We would sit down and say "Okay, here is what you wrote in this document. Rewrite it in plain English. Let's sit here and go through it." Every one of them would say, "These are not written for school children;" "There is an old decision that says these are not written for school children." I pointed out, "You are exactly right because my children do not have enough money to invest in these things. However, at the same time they are written for intelligent, professional people, who often are lawyers who just did not happen to live inside this deal with you for the last year."

We had many experiences in these visits. I was at one law firm where they were particularly nasty and I had to actually resort to the "this is the rule so get over it" approach, which does not always go very well. We sat down with a risk factor they had written in a prospectus and I split the room in half and they said, "This is common;" "This is in every document;" "Everybody knows what this means." When I got it back from them, half had picked one and half had picked the other as to what it meant. They were both in there. It actually meant two things. To each side their interpretation was the most important thing. They, of course, came up with good reasons why that was okay. They then concluded that I had not proven my point while I was there. I nevertheless felt pretty good when I got back on the shuttle to come home from New York.

I think that this experience proves our point. People live inside whatever they are working on. As Professor Cohen noted, drafts are generally "crystal clear" to reporters and the "insider" drafting group. They have lived with this. They have thought about the

problem. They know why the writing is drafted. It is obvious to them. However, when given to somebody else it is not obvious because they do not know everything that went onto the drafting.

V. Write What You Mean and Know What You Are Trying to Accomplish

Let me state a basic rule and some examples. I make the suggestion as to how to write in plain English. Apply this basic test. If you are reading something and you don't understand it, talk to the person who wrote it. When they say, "Oh, what this means is A, B, C & D." You should say, "Well that is what you should have written." That is the key thing. "Write what you meant. Write what you were trying to say. Just say it."

Another reason plain English is scary to some people is that you have to really know what you are saying. You have to know what you are trying to accomplish. Otherwise, you are going to clearly say you do not know what you are talking about. That can be a fairly daunting task.

We come across this all the time. We have a lot of rules that are written in the passive voice and passive voice can occasionally be fine. There are not a lot of cases where it is preferred. However, we have a lot of passive voice rules. People will come to me and say "Okay, well who files this?" The rule will say a registration statement needs to be filed, etc. Who files? Oh, I guess we should have said that. You have to know what you are talking about and an active voice will really bring that out.

VI. Get Over Yourself

The last thing I would point out, and this is something that is going to come across as a little crass, but it is something that I had to do as well, is get over yourself when you are writing this stuff. There are a lot of people who think "I wrote it and therefore that makes it right and people should come up to my level." Get over that! That is just about the most absurd notion I have ever heard. *Write it for the reader. Do not write it for yourself.* That is what it is all about.

Now how do you apply that to what we are drafting up here? Write it for the person who is reading it and trying to understand it. Write it very clearly. One thing I tell my people, "If you write anything that is not actionable on its face, then you have not accomplished anything."

That is the goal. That is my suggestion to everybody. Just write it so that the person who reads it the first time through—if they cannot get 100 percent they better be pretty much there and know where to look to get the rest. They should not have to read tea leaves into it.

VII. Getting Acceptance of Simplification Guidelines

Can it be done? Yes! We briefly shared our experience here. The rule became effective October 1, 1998. To let you know how thrilled people were about it, let me inform you that we usually get about fifty to seventy-five registration statements in a week. The day before the rule became effective we got 300. After my year and a half of outreach, people were all ready to go into battle with me. They were still not willing to simplify. However, it was the rule. For the first three months we just did battle on every necessary occasion. It did not matter who or what it was—everybody and everything had to follow these rules.

What did that do? It was a challenge to us. Basically last Christmas was a wash for me and it was very hard at the beginning. We were slow. People were complaining. Everything was going badly. However, we found the tide turned about March of last year when we got a critical mass of examples. We had obtained 150 volunteers and a pilot. However, because it was a pilot project, we couldn't really push them. They were offering to do this for us. But once it became the rule we were able to make everybody do it, and by about March we had about two or three hundred examples for people to consider. They could find one that was near their deal. In addition, our people had also figured out how to do it. Once we got to that point, we published. It took us until June to get this done. However, we published on our website the forty or fifty most common comments that we were putting out. We had objective examples which met the complaints that implementation of the rule was merely a subjective thing. This was a huge turn for everybody.

VIII. Loss of Precision Fear and Clarity Not Brevity

The biggest complaint is that clear writing, increases liability. That argument is somewhat counter-intuitive. However, I do not try to dismiss it because securities litigation is what it is. Fighting class action suits is not fun. So we tried to work with people and convince them that we were not trying to lose precision. We are trying to say exactly the same thing in simplified, understandable language. What matters is clarity, not necessarily brevity.

Sometimes plain English is longer; it takes up more space. This is not the end of the world. If it is clear, people will read the extra page.

That would be my advice. Make sure you know what you are saying. Say it. The liability argument has not been an issue thus far and it is working very well. We are living proof that you can do this.