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March 19, 2003

Chairman William H. Donaldson
Securities & Exchange Commission
450 Fifth Street, NW
Washington, DC 20549

Re: WorldCom

Dear Chairman Donaldson:

I am writing because I believe the SEC's enforcement response to WorldCom's crimes—the largest corporate fraud in U.S. history—has been, to date, grossly inadequate and fundamentally misdirected.

Just from what is known so far, WorldCom engaged in a concerted program of manipulation over three years by which it fraudulently manufactured \$9 billion in income, making victims of investors, pension funds, and every honest company struggling to survive the telecom meltdown. Investors lost roughly \$175 billion—more than three times the losses in Enron. And WorldCom's brazen scheme dramatically deepened the crisis of confidence in corporate America, imposing incalculable costs across the economy.

While the SEC and Justice Department have focused on pursuing the *individuals* who perpetrated this crime, the government seems poised to allow WorldCom *as a company* to escape with the fruits of its unlawful conduct. What the government is wholly ignoring is that a significant part of WorldCom's business is itself the product of the fraud. If WorldCom is allowed to reorganize under Chapter 11 of the bankruptcy laws and reemerge debt free, this would permit WorldCom to continue to profit from those ill-gotten gains and would perpetuate, and indeed magnify, the injury suffered by honest competitors already victimized by WorldCom's conduct.

Such a result would be as gross an injustice as the underlying fraud itself. The government's willingness to accept such an outcome can only stem from a fundamentally mistaken view of the relationship between the securities laws and the Bankruptcy Code. The government seems to believe that its enforcement actions must be adjusted to comport with WorldCom's options under bankruptcy law. This is exactly backwards. The bankruptcy law expressly recognizes that the government's enforcement interests take precedence over the rights normally afforded to companies in bankruptcy.

Therefore, WorldCom's options in bankruptcy must be limited to those dispositions that comport with the government's enforcement interest. As discussed more fully below, the SEC should seek WorldCom's liquidation, because that is the only remedy that can eliminate the taint of WorldCom's unprecedented unlawful conduct.

The core mission of our justice system is to ensure that "crime does not pay," and the core mission of our securities laws is to ensure that securities fraud does not pay. Thus, when individuals commit crimes, they are not only punished but also compelled to surrender the benefits gained from wrongdoing. Likewise, when a business engages in crime that produces illicit advantages, it is axiomatic that—whatever individual punishment is meted out—*the company itself cannot be left in a position to profit from those ill-gotten gains.*

In WorldCom's case, the fraud was so massive that a significant part of its business today—its assets, customers, and market position—are the fruit of criminal conduct. From 1999 to 2002, WorldCom doubled its debt, fraudulently raising about \$15 billion, which it then used to expand its assets, operations and customer base. WorldCom also used its fraudulently inflated stock to gain strategic advantages through acquisitions. Its reporting of false results weakened competitors and helped it capture greater market share.

Reorganizing under Chapter 11 would allow WorldCom to capitalize on these ill-gotten gains. It would emerge debt-free with assets and customers it would not have had but for the crime. Forgiveness of the \$15 billion in fraudulent debt would give WorldCom the balance sheet of a criminal enterprise—putting WorldCom in the same position as if it robbed a bank, plowed the proceeds into its business, and escaped scot-free. Its competitive advantages would flow directly from criminal conduct.

A simple analogy sharpens the point. Imagine two competing trucking firms. One is an honest business, leasing trucks and making payments on time. The other is a criminal enterprise, which acquires its trucks through theft and uses this illicit advantage to steal business from the honest firm. There are two classes of victims—those whose property is directly stolen, and those whose businesses are injured by the criminal enterprise's illicit advantages.

What must the government do to right this wrong? Obviously, the individuals who stole the trucks should be punished, but just as obviously this alone does not remedy the offense. If new management is simply allowed to take over the corrupt company, keeping and using stolen trucks, the law-abiding competitor will still be a victim. It will lose customers and profits, not because it was beaten in the marketplace, but because it must compete against an enterprise built on criminal activity.

So too with WorldCom. Under a reorganization, WorldCom would be allowed to profit from securities fraud, and competing firms would continue to be the victims of a massive crime. The fact that the new owners would be WorldCom's creditors—

themselves victims of the fraud—does not justify allowing those new owners to exploit WorldCom's ill-gotten gains. *It is patently unjust to reward one set of victims by offering them the opportunity to "cash in" on the crime at the expense of another set of victims.*

Measured against this standard, the SEC's partial settlement with WorldCom falls far short of what is required to ensure a just result and to deter other would-be violators of the securities laws. That settlement—which does not even require WorldCom to admit that it broke the law—would do little more than enjoin *future* violations of the securities laws and attempt to reduce the risk of such *future* violations through a mix of training and oversight of WorldCom's employees. The settlement would do nothing to address the fact that WorldCom is using its bankruptcy as a vehicle to continue to profit from its crimes.

The proper course is the sale of WorldCom's business in an auction under Chapter 7 of the bankruptcy law. Liquidation would bring justice to all victims. Creditors would be paid from the sale proceeds, allowing them to capture WorldCom's fair value without giving them the unfair opportunity to participate in the upside of criminal conduct. WorldCom's employees would keep their jobs under the employ of new owners. And competitors would get a fair shake, because any buyer, having paid fair value, would have a cost-structure on par with an honest competitor. The taint of WorldCom's misdeeds would be purged once and for all.

The SEC has the means to achieve this result, and the bankruptcy laws are no impediment. The Bankruptcy Code is clear that WorldCom's bankruptcy is no bar to the SEC's continued prosecution of securities fraud claims against the company. Moreover, the Bankruptcy Code expressly gives the SEC standing as a party in interest in WorldCom's bankruptcy that can be heard on any issue. The SEC therefore has standing under section 1112 of the Bankruptcy Code to oppose any plan of reorganization proposed by WorldCom and to seek the conversion of WorldCom's bankruptcy to a Chapter 7 liquidation.

The only showing the SEC must make to secure this result is that "cause" exists to convert WorldCom's case to Chapter 7. Section 1112 provides a non-exhaustive list of factors constituting "cause" for liquidation, and courts have recognized that the inability to effectuate a reorganization plan, and the absence of "good faith" and "clean hands," are independent justifications for conversion to Chapter 7.

Here, the "cause" is readily apparent. If WorldCom is not liquidated, it will profit from its massive violation of the securities laws, meaning that the company is lacking in both "good faith" and "clean hands." Further, the SEC can compel the conversion of WorldCom's bankruptcy to Chapter 7 by making it clear to the court that it would not allow a reorganized WorldCom to issue securities, on the ground that the company would still be tainted by fraud. WorldCom would thus be unable to effectuate a reorganization plan, and the conversion of its bankruptcy to Chapter 7 would be virtually automatic.

At this point, it is no overstatement to say that WorldCom would be a valueless enterprise but for its fraud. In its most recent financial statement, WorldCom wrote down almost \$80 billion, leaving the company with a valuation of just \$10 billion. Given that WorldCom fraudulently borrowed roughly \$15 billion in debt that it is seeking to have forgiven in bankruptcy, there is literally nothing left of WorldCom that is not attributable to its crimes.

None of the arguments that have been made on WorldCom's behalf warrant leniency. Some have asserted that WorldCom should be spared enforcement because it is a major supplier of important services to the government, including services important to law enforcement and national security, that is "too big to fail." Others have lamented that liquidation would put WorldCom's employees out of work.

This argument is a red herring. No one is talking about sweeping away WorldCom's business, *à la* Arthur Andersen. In a liquidation, qualified buyers would buy WorldCom's assets (along with the services of its employees) at fair prices and continue to operate them. Thus, the issue is not whether the business continues to exist, or whether the government will still be able to obtain critical services. It is whether the ongoing business has the cost structure of an honest enterprise or a criminal enterprise, and whether the government obtains services from vendors who fairly compete, or instead seeks to cash in on the crime by effectively serving as a "fence" for stolen goods.

WorldCom apologists also claim that the company deserves leniency for cooperating with the government's investigation. But cooperation cannot trump the numerous other factors that dictate action against the corporation in this case, including the crime's unprecedented scale, its brazen nature, its catastrophic impacts, the involvement of senior officials, and the unscrupulous corporate culture that bred these offenses.

WorldCom's cooperation results from necessity, not probity. The crime here was so egregious that the company had no choice but to cooperate. If this kind of "desperation cooperation" were rewarded with a pass, the most brazen criminals would go scot-free, while those with the temerity to raise a legitimate defense would suffer the harshest punishment. This result cannot be squared with any rational concept of justice.

In any event, law enforcement gives greatest weight for cooperation when it helps to snare a bigger fish. Here, there is no bigger fish than WorldCom.

Finally, WorldCom derides calls for liquidation by claiming that those urging it are self-interested. That is true, but only in the sense that any victim of crime has a strong self-interest in making sure that it is not victimized again. Liquidation will not eliminate WorldCom as a rival. It will level the competitive playing field by ensuring that WorldCom and its assets are owned by someone who paid a fair price for them.

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In a capital-intensive industry like telecommunications, reorganizations are inherently destabilizing, because they risk a downward spiral in prices that denies non-bankrupt companies the opportunity to service their debt and recover their investments. To allow a corrupt company to perpetuate its violation of the securities laws and visit this injury on an already shaken sector would be an injustice of the highest order.

Please do not hesitate to contact me if you would like to meet to discuss this matter further.

Respectfully,

A handwritten signature in black ink, appearing to read "W. P. Barr". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

William P. Barr

cc: Attorney General John Ashcroft
Deputy Attorney General Larry Thompson
FCC Chairman Michael Powell