THE APPROACH OF THE PRACTITIONER TO THE S.E.C.

Address by

Edward N. Gadsby
Chairman
Securities and Exchange Commission
Washington, D. C.

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I am sure all of you are aware that the Securities and Exchange Commission is responsible for the administration and enforcement of six basic statutes, namely, the Securities Act of 1933; the Securities Exchange Act of 1934; the Public Utility Holding Company Act of 1935; the Trust Indenture Act of 1939; the Investment Company Act of 1940; and the Investment Advisers Act of 1940. It also has certain advisory functions under Chapter X of the Bankruptcy Law, the so-called Chandler Act. Each of these basic and complicated statutes has been supplemented by a body of Rules having the force of law which are in some cases extremely technical and detailed. Nevertheless, in any field so complex as corporate financing and so vast as the securities markets, there still arise constant problems of construction. There is no available compilation of the answers to all these questions, since it would be a gigantic task to publish every ruling of this nature, and the result would not justify the enormous expense involved.

However, since its inception the Commission has placed great emphasis upon encouraging persons subject to its jurisdiction to confer with it concerning the manner and means of complying with the statutes it administers and with its rules, and this program has paid handsome dividends over the years. Generally speaking, most persons are interested in complying with the law rather than in attempting to violate or evade it. With this in mind, the Commission freely offers interpretative advice to the public in general and to private practitioners in particular for the purpose of facilitating the lawyer's practice before the agency. We recognize that the statutes which we administer deal with relatively complex matters and problems, and the statutes themselves are by no means models of clarity. While we attempt by our formal rules and regulations to provide a guide to the lawyer, interpretative problems necessarily arise whenever you are dealing with words. Even persons who have acquired some specialized experience in the securities field find it necessary from time to time to consult with our staff for the purpose of solving new problems. We deliberately encourage inquiries of this nature, since we feel that they serve to prevent violations of the law and so to simplify our own work, as well as to help the public.

The procedures for obtaining this advice are very informal. As I am sure most of you know, such inquiries may be made by telephone, mail or personal visit. With respect to most problems, interpretative advice can be obtained in the Commission's nine regional and eight branch offices located in strategic cities throughout the country. If a problem is

presented which the regional office for some reason cannot handle, it will obtain the necessary advice from the headquarters office for the inquirer. Direct inquiry may also be made to the home office, where each division of the Commission has staff attorneys who render advice concerning the statutes administered by it.

The only basic ground rule governing such approach is that we receive all of the facts, including the name of the corporation or individual involved. This is necessary since we cannot give interpretative advice on hypothetical situations. In order that we may make proper rulings, we ask in any case involving a serious question of some moment, that it be submitted by letter. Depending upon the complexity of the problem presented, it may be desirable to arrange an appointment with a member of our staff to discuss the problem informally prior to submitting the full statement of facts for determination.

While we insist on full disclosure of all the facts to protect persons and lawyers who seek such advice, our policy is to treat such inquiries and our responses as confidential, and we have in the past successfully resisted attempts to subpoena such material. 1/ Whenever the Commission believes it is desirable to publish certain interpretations because of their general importance to the industry and the bar, we are careful to delete the names and other identifying information prior to publication. In this connection, you will note that the Commission's quasi-judicial opinions, as distinguished from these administrative interpretations, are matters of public record and are always published so that they will be available to the public and practitioners.

While interpretations rendered by our staff are not to be deemed opinions of the Commission, they do represent the considered judgment of responsible staff members familiar with the various statutes and rules involved. If there is some doubt in the matter, as for example when the question does not lie within the orbit of a considered Commission decision, the matter is customarily referred to the Commission for instructions. The opinions of our staff are, of course, not binding upon the courts, nor for that matter are the opinions or policy statements issued by the Commission itself. However, an administrative agency's consistent construction of the statutes administered by it is given great weight by the courts when litigation does ensue and even greater weight is given to its construction of its own rules. We at the Commission are proud of this interpretative service

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1/ Pergament v. Frazer (S.D.N.Y., 1950, Civil Action No. M8-85).

which, in 1955, the Hoover Commission characterized as "an excellent practice . . . most effectively used."

Many of the proceedings which come before the Commission are initiated by the filing of certain forms, such as registration statements and prospectuses, Regulation A notifications and offering circulars, and broker-dealer applications. There are special forms designed to fit special situations and forms which persons coming under our jurisdiction are required to file with us. While, of course, the staff must and does carefully avoid any appearance of drafting these papers on behalf of the inquirer, it is always available, first to discuss with anyone the proper form which should be used in a given situation, and second to discuss the extent of the material required to be included in the form. Especially helpful are pre-filing conferences in connection with registration of securities under the 1933 Act. Such conferences very often serve to avoid problems which, if not cleared up in advance, might delay the effective date of the registration statement.

I should also mention the so-called "no action" letter, which is sometimes rendered by the staff. While this letter has no binding effect and is of limited legal significance, we have found that the bar regards it as an important and useful device. In substance, the "no action" letter is a statement by the staff that, on the facts as presented to them, they will not recommend that the Commission take any action if the attorney proceeds on the basis of his opinion that the statutes do not prohibit his proposal. I am not informed of any case where the Commission has initiated any proceedings after a letter of this nature has been issued, provided that the letter requesting the "no action" position has accurately presented all the facts.

On occasion, public or private practitioners may wish to complain to the Commission concerning actions or transactions which they believe to be in violation of the statutes or rules administered by the Commission. While we are more than happy to receive and process pertinent complaints, the Commission, like other Federal administrative agencies, reserves the privilege of exercising its full discretion in determining what action, if any, should be taken with respect to them and, as a matter of fundamental policy, will not make any progress or other reports to the complainants. The Commission may decline to take any action if it believes that no violation has occurred or that action is not warranted in the particular circumstances for other administrative reasons. Failure of the Commission to act, however, does not prohibit the complainant himself from instituting a private lawsuit if he so desires. There has, as a matter of

fact, been a distinct and possibly growing tendency for the courts to permit such a suit based on violations of the law, even though no specific private remedy is provided in the statute. Incidentally, the courts have held that the Commission's exercise of its discretion in regard to bringing or failing to bring action is not reviewable. 2/ It could not be otherwise for the courts are not in a position to weigh the various discretionary factors which must be considered in determining whether the facts in a particular situation warrant bringing into play the full force of the Federal Government through the administrative agency involved.

I want to say just a few words about amicus curiae participation by the Commission. Frequently, issues involved in private lawsuits are important because of their impact upon the Commission's own administration of the statutes involved. Accordingly, where appropriate, the Commission will file amicus curiae memoranda or briefs and on occasion participate in oral arguments. The purpose of such participation is not to aid a particular party but rather solely to assist the courts to arrive at what the Commission deems to be a proper construction of the statute. Private practitioners frequently request the Commission so to participate in actions in which they are involved. The answer of the Commission in any situation, however, will depend not upon the request of the party, but rather upon whether we believe that the question presented as to the construction of the statute is sufficiently important to warrant our participation. We are pleased to be informed of pending litigation involving statutes we administer in order that we may be aware of cases in which we may desire to participate as amicus. As a matter of general policy, where we do participate we avoid becoming involved in any factual disputes or any legal questions not pertaining to or affecting the administration of the statutes. However, if a court requests us to assist as amicus, we may brief questions not directly involved in our administration of the securities laws, such as questions relating to the private civil recovery rights which I mentioned a moment ago.

Although, in the very nature of things, the Commission itself cannot be expected to consider any substantial percentage of the many routine matters passed on every day by its organization, we do not feel that we ought to delegate a final or arbitrary authority to the staff. Consequently, a request for a conference with the Commission itself concerning any matter where an appeal is not otherwise provided and where one of our customers feels that he has not been fairly treated will be given sympathetic consideration. If it appears from the record that there is

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2/ Leighton v. S.E.C., 221 F. 2d 91 (D.C. Cir., 1955), cert. den. 350 U. S. 825 (1955).

any reasonable basis for such a claim, the request will be granted and an opportunity given for presentation of argument in a highly informal atmosphere. The Commission meets once or twice daily and such a conference is quite easily arranged.

Finally, I cannot permit this occasion to pass without reference to the new Rules of Practice which we have adopted. In some measure, these Rules are essentially similar to the present Rules or are mere clarifications of existing procedures. However, a number of important changes are also included, most of which are designed to simplify or expedite procedures in agency hearings. Except for one provision, which is effective later on, the new Rules of Practice will become effective on October 1. Copies are available, of course, from the usual sources.

In conclusion, I wish to assure you that the Commission is most anxious to render whatever assistance it possibly can to all private practitioners who desire assistance on problems within its jurisdiction. The only consideration we expect is honest, candid and sincere requests intended to achieve compliance with the law.

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