THE GOVERNMENT LAWYER AND THE PRIVATE PRACTITIONER -- COOPERATION AND ASSISTANCE IN THE FEDERAL SPHERE

Address of

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before the

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I am greatly honored by the invitation to address your Section of the Louisiana State Bar Association.

I am taking this opportunity to speak to you about an aspect of the work of lawyers in the federal service which, I think you will agree, is highly important to the general practitioner and yet, I suspect, not very well known to or appreciated by him. Too many general practitioners, I regret to say, view the government lawyer as nothing more than a potential adversary. Relatively few appreciate the fact that in practically every federal department and agency today there is available from the legal staff interpretative and other assistance which the average private practitioner would find extremely helpful in coping with particular problems in specialized areas of federal law. The nature and availability of such assistance are, of course, well known to the specialists. They have important functions of their own, and I doubt that anything I have to say at this time will have any appreciable effect upon their business -- referral or otherwise. I do believe it desirable, however, that a little more information be disseminated to the bar generally on this aspect of the services performed by those of us who are in the federal service.

In the limited time which is available to me, it is obvious that I cannot possibly deal with the particular practices and policies of each of the various federal departments and agencies -- and I am not prepared to do so. I am, however, particularly familiar with the practices and policies of the Securities and Exchange Commission, with which I have had the honor and pleasure

of being associated for nearly two years -- first as Assistant General Counsel, and more recently as Associate General Counsel. I believe that our practices in this area are basically similar to those of other federal agencies and illustrate both the services available to you and certain limitations thereon.

The Securities and Exchange Commission is charged with the administration of six federal statutes, viz., 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. The Commission also has certain statutory functions under Chapter X of the Bankruptcy Act. Pursuant to authority granted in these statutes, it has also promulgated rules and regulations which have the force of law. These statutes and rules deal with somewhat complex matters; and while we have been making every effort recently to simplify our own rules and regulations insofar as it is practicable to do so, we recognize that the statutes and regulations may, at times, be a little difficult for the practitioner who is not versed in the securities laws to grasp. Indeed, there are times when the specialists and we ourselves struggle with interpretative problems presented in particular cases. Whether the problem be simple or difficult the Commission, although always anxious to serve the public, is not required by law to render interpretative advice. It does so, however, as a matter of sound administrative policy.

We believe that persons affected by the statutes and rules which we administer should be assisted in understanding them and their application in particular cases. We are also motivated, in part, by the fact that this is an important aspect of obtaining compliance with the law. I do wish to emphasize, however, that interpretations rendered by the Commission's staff are just that -- and nothing more. They do represent,

however, the considered judgment of a responsible official familiar with the statute in question. The ultimate construction of the statutes and the Commission's rules, of course, is for the courts. The answers to most questions, I am happy to say, are found in the clear language of the statute or rule, or in court decisions. In these instances the task of the staff attorney is relatively simple -- viz., merely explaining the statute or rule, and calling attention to the particular language thereof or the court decisions governing the matter. There are, of course, other instances in which the applicability of a statute or rule in particular circumstances is not settled and may be the subject of a reasonable amount of dispute, and where the judicial decisions may not be helpful. The staff's opinion, or the Commission's for that matter, of course is not binding as a matter of law. While an agency's consistent construction of a statute it administers is entitled to considerable weight in the courts, see U. S. v. American Trucking Ass'ns, Inc., 310 U.S. 534, 549 (1940), and in the case of its own rules and regulations is entitled to even greater weight, see Bowles v. Seminole Rock & Sand Co., 325 U. S. 410, 414 (1941), as I have previously indicated the ultimate decision is for the courts. Hence, it is important for private practitioners who receive what they regard as favorable opinions from the Commission to realize that such opinions may not be binding in any private litigation which may subsequently arise from the particular transactions involved.

This brings me to say a word or two about interpretative questions pending in private litigation to which the Commission is not a party. In addition to providing for civil and criminal enforcement action by the

government, the federal securities statutes authorize various types of civil suits for private relief. Where a particular interpretative question is involved in a private lawsuit and is pending before a court for determination, it is our policy not to express an opinion on that interpretative question to counsel for one or more of the parties who sometimes seek our views. Where the matter is sub judice, if we have a viewpoint which we desire to express it is our practice to seek leave to participate as amicus curiae in the private lawsuit and to file with the court a memorandum of law or brief on the question or questions of law involved. I shall have something more to say presently about our amicus curiae participations. There is, however, another limitation on our interpretative services which I ought to mention at this time. We do not usually give interpretative advice on questions which are peculiar to the private civil liabilities provisions of the federal securities laws and which do not affect our own administration of these statutes. These include questions such as one's standing to maintain a class action under particular provisions, shifts in the burden of proof, measure of damages, and so forth. While we do not consider that we have any special expertise in this area, occasionally when specially requested to do so by a court, we may file a brief as amicus curiae on such questions.

I pass now to the procedure by which one obtains interpretative or other assistance from our staff. We have no fixed requirement as to the method of making inquiry. It can be done by letter, telephone, or personal visit. Many, if not most, inquiries can be handled by the nearest SEC regional or branch office. The SEC regional office for the New Orleans

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be interested in knowing, has been singled out for commendation in the Hoover Commission report on legal services and procedures wherein it is described as "an excellent practice . . . most effectively used." The interpretations of which I have been speaking should not be confused with the decisions rendered by the Commission itself in administrative proceedings of a quasi-judicial nature under the various statutes. The Commission's findings and opinions in such proceedings are, of course, matters of public record and are always published.

I turn now to the assistance available in connection with filings made with the Commission. Our staff will assist you in ascertaining the proper form or forms to be employed and will discuss with you the kind of information which is required in particular forms. You may be referred to previous filings in similar cases for whatever assistance they may be to you. Pre-filing conferences with respect to specific problems are especially helpful to the private practitioner in registration matters under the 1933 Act in enabling him to file a registration statement which will be in acceptable condition and avoid problems which may possibly delay the effective date of the statement. As in the case of interpretations, a good deal of assistance here can be obtained from the regional or branch offices -- frequently all that you may need in a particular matter. I should mention that some filings under the 1933 Act are made directly with the regional offices -- e.g., filings under the Commission's Regulation A which exempts certain small securities issues from the full registration requirements of that Act if certain conditions are met. In such cases you will certainly want to discuss your problems with the appropriate regional office. Problems

relating to certain other filings, such as proxy statements under the 1934 Act, might perhaps better be discussed from the outset with the Washington office. The regional office will advise you when this is the case. I do want to emphasize that there is a great deal of coordination between the headquarters and regional offices which, we believe, has resulted in a minimum of delay and duplication of effort. Before leaving this phase of the subject, I might mention that which I suspect you already realize -- namely, that our staff while willing to assist a private practitioner at any time does not participate in drafting material to be filed, or suggest the answers to particular questions in the forms. The filings are those of the company or individual you represent. It is your task to prepare those filings, not ours. Perhaps this is too obvious to warrant mention. You may be surprised to learn, however, that there are some people who seemingly labor under the misimpression that this is part of our function, too.

There are occasions where the staff will issue what are commonly referred to as "no action" letters. These are generally requested in situations where contemplated transactions are believed by the private parties not to be contrary to particular provisions of the federal securities laws, but where it is regarded as important that advice be received that the Commission does not take a contrary view which would call for adverse action on its part. A typical case is one where someone seeks to sell a large block of stock to the public and where there may be a question whether he is a controlling person so as to require registration of the offering. The proposed seller who claims that he is not a controlling person will submit in writing what he considers to be all of the relevant facts. Upon consideration

of the facts submitted the staff may advise the proposed seller that it will not recommend that any action be taken if the offering and sale are made under the stated circumstances without registration. The staff, of course, may decline to issue such a letter if it feels that it would be inappropriate for it to render such assurance; or it may take a more affirmative position that registration is required. A "no action" letter has no binding effect upon the parties in subsequent private litigation if there be such as a result of the transaction or transactions in question. Despite the limited legal significance of such a letter, it is generally regarded by the industry, and by the bar, as important and useful.

Private parties who believe that they have been injured by another's violation of one of the federal securities statutes not infrequently will also seek the assistance of the Commission in obtaining redress. Our statutory authority in this area -- fortunately or unfortunately -- is limited. Various administrative sanctions are available to the Commission in different types of situations. Our basic court remedy is the injunction against acts or practices which violate the statute. There are also criminal sanctions for wilful violations. None of these, in itself, provides for private redress. The question whether restitution or other equitable relief to injured individuals may be ordered in an injunction suit brought by the Commission has not yet been clearly determined, although there is some authority and certainly respectable argument for an affirmative answer. As previously indicated, however, the federal

securities laws do authorize independent actions for private recovery by the injured parties themselves. Moreover, whatever other rights of action there may be under state law are expressly preserved by these statutes.

Apart from the question of private redress, an attorney will sometimes lodge a complaint with the Commission on behalf of a client with the request that action be taken against the alleged transgressor. This, of course, is the right and duty of every citizen. There is no single method of bringing an alleged statutory violation to the attention of the Commission. Our enforcement staff, I believe, would prefer to have a statement in writing accompanied by such evidentiary material as can be supplied. Again, this is a matter which may appropriately be taken up with the regional office. The cooperation of private persons with knowledge of the facts is highly important in the Commission's enforcement of the statutes.

Like other governmental agencies, the Commission is vested with full discretion as to the action, if any, to be taken on such a complaint. If it does not believe there has been a violation of the statutes it administers, or if for other reasons it does not feel that the action requested of it is warranted under the particular circumstances, it may decline to accede to the complainant's request. Its refusal to take the requested action is not subject to review. Thus, in the recent case of Leighton v. S.E.C., 221 F. 2d 91 (C.A. D.C. 1955), cert. denied, 350 U.S. 825 (1955), the Court of Appeals dismissed for lack of jurisdiction a petition seeking review of the Commission's refusal to accede to petitioner's demand that it take action to compel the American Express Company to file a registration statement in

connection with its sales of travellers checks. The Commission's staff had disagreed with the petitioner's contention that travellers checks were "securities" within the meaning of the Securities Act of 1933, and that the Commission had jurisdiction of the matter. The failure of the Commission to take action requested of it, of course, does not preclude the complaining party from instituting a private lawsuit of his own. As I have indicated, apart from the fact that the Commission's interpretation of a statute is not binding upon a court, its failure to institute proceedings may well have been based upon considerations other than those of statutory interpretation -- considerations, moreover, which may have no relevancy in an action for private redress. In some areas, such as proxy solicitations where time is of the essence and where the complaining party sometimes has greater knowledge of the facts and is in a better position to institute immediate court action charging violation of the Commission's proxy rules, private actions may serve a salutary purpose in the enforcement of the statute and the Commission's rules thereunder.

There may be a situation where one of you may represent a client whom we are investigating. It is not my intention to advise methods of helping a guilty client evade any of the sanctions imposed upon violators of the statutes we administer. If we are investigating a client of whose innocence you are convinced, frank disclosure to us of all the facts will be to his advantage, since we are not interested in continuing an investigation of someone who is innocent. Such disclosure may also be to your client's interest even in the case of a technical violation where the facts indicate there has been no intentional wrongdoing.

I shall turn now to the matter of Commission participation as amicus curiae in private litigation. Private lawsuits frequently present for determination interpretative questions which are important to the Commission in its own administration of the statute or statutes involved. In appropriate cases, the Commission will file a brief or memorandum of law, and participate in the oral argument on such questions. While the effect may be to aid the party or parties whose position accords with that of the Commission, the Commission's purpose is simply to aid the court in arriving at a correct construction of the statute. As amicus curiae the Commission always avoids involvement in any factual disputes, and makes no factual assertions of its own. It is the Commission's policy also, wherever possible, not to become involved in legal questions which do not pertain to the construction of the federal securities laws or questions which do not affect the Commission in its own administration of these statutes. However, as I have indicated earlier, there have been occasions when, as the result of the special request of a court, we have briefed questions wholly peculiar to the private civil recovery provisions of the federal securities laws.

As you can well imagine, because our participation may be of considerable value to the party with whom we may agree on an interpretative question, attorneys frequently request us to participate. Permit me to observe, however, that there have been occasions when an attorney has "guessed wrong" -- where the Commission's view of the statute was not as he had supposed. Perhaps needless to say, Commission participation is not dependent on whether counsel for one or more of the parties requests it. If the

Commission is apprised of a case involving interpretative issues which it believes warrant its participation, it will seek in the public interest to express its views thereon and the reasons therefor, whether or not any of the parties request or desire it to do so.

In a good many instances the Commission's only knowledge of the pendency of particular litigation may come from the private counsel involved therein. Accordingly, we are always glad to be apprised of the pendency of litigation under our statutes, whether or not counsel desires our participation and whether or not we may ultimately participate.

An attorney who requests our participation in a particular case should send us copies of the pleadings which raise the interpretative questions -- generally they arise on a motion to dismiss or a motion for summary judgment -- and copies also of any briefs or memoranda of law which have been filed. This should be accompanied by a letter summarizing the nature of the case and the interpretative questions presented, setting forth the reasons why it is believed Commission participation is warranted, and advising us with respect to the time schedule for the filing of briefs and presentation of oral argument. In appellate court cases, we should like to have a copy of the printed record if available, and copies of any briefs which have been filed. These may be sent directly to the Commission's General Counsel in Washington, D. C., whose office handles these matters.

I think I ought to mention in this connection that, principally because of budgetary considerations in recent years, we have had to curtail sharply our amicus curiae participations. This curtailed program has been

noted with disappointment by some courts, as well as by private counsel. We do try, however, to be of as much assistance to the courts as our limited budget and manpower permit.

As you have probably observed, I have spoken this morning in a rather general vein. Time limitations, of course, compelled this. My objective has been simply to give you some appreciation of the type of assistance which you in private practice may expect to obtain from those of us in the federal service when you have problems in specialized areas of federal regulation. I think that I have achieved my objective if I have instilled in you the feeling that you can represent your clients well when they have problems under the statutes and regulations which we administer if you proceed on the assumption that we in the federal service stand ready and willing to cooperate with you and to lend you a good deal of assistance in achieving proper solutions of these problems.