

M E M O R A N D U M

January 30, 1957

To: A. E. Scheidenhelm, Executive Director

From: Thomas G. Meeker, General Counsel

Re: Commissioner acting as Executor

Reference is made to a memorandum dated January 16, 1957, from William E. Becker, Director of Personnel, to the General Counsel, in which Mr. Becker requested comments as to whether the conclusions reached in the memorandum dated May 18, 1956, are applicable to members of the Commission. The memorandum of May 18, 1956, was an opinion on the question of whether Commission employees might act as executors of estates.

To the extent that the memorandum of May 18, 1956, interprets the Conduct Regulation and the effect of 18 U.S.C. 281 and 283, it applies equally to members of the Commission. However, the legal question involved in a Commissioner's acting as an executor presents a problem not discussed in the memorandum of May 18, 1956. The Securities Exchange Act of 1934 contains specific limitations upon the activities of members of the Commission. The Act provides in part in Section 4(a):

“. . . No commissioner shall engage in any other business, vocation, or employment than that of serving as Commissioner, nor shall any commissioner participate, directly or indirectly, in any stock-market operations or transactions of a character subject to regulation by the Commission pursuant to this title . . .”

There is no legislative history with respect to this provision. It has not been the subject of either judicial or administrative interpretation. Comparable provisions of statutes creating eight other administrative bodies have been examined. With respect to these, there does not appear to be any decision of any court or any opinion by the Attorney General or Comptroller General interpreting any of these provisions.¹

It would appear that all of these statutes seek to accomplish the same basic purpose, i.e., to require a commissioner to devote the time necessary for him to perform the duties of his office, and to preclude a commissioner from engaging in pursuits which would prevent his giving proper attention to the performance of his official duties.

¹ The several statutes do not use precisely the same language. For example, one statute requires each member to “devote his full time to the duties of his office.” Another statute requires a commissioner to devote his “entire time.”

In the first part of Section 4(a), the 1934 Act prohibits a commissioner's engaging in ". . . any other business, vocation, or employment, than that as serving as commissioner. . ." An examination of cases in which the words "business," "vocation," and "employment" have been defined will demonstrate that the courts have interpreted them as having similar and interchangeable meanings.

In Higgins v. Commissioner of Internal Revenue, 312 U.S. 212, the Court stated that the word "business" is a very comprehensive term and embraces everything about which a person can be employed. In Rosenblum v. Anglim (D.C. Cal.), 43 F. Supp. 889, the Court defined business as that which busies or that which occupies the time, attention, or labor of one as his principal concern, whether for a longer or shorter time.

There is a substantial line of cases which apply the same language as that stated in the Rosenblum case, supra, but add to the definition of "business" that the activities are engaged in for the purpose of providing a "livelihood."

In interpreting a sales tax statute which imposed a tax upon a person engaging in the "business of selling real estate," it was held in Stone v. M. L. Viridon Lumber Company, 205 Miss. 840, 39 So. 2d 498, that the sale of three lots in 1945 and of five lots in 1946 did not amount to engaging in business so as to subject the seller to the tax.

The word "vocation" has been similarly interpreted. In Employers Liability Assurance Corporation v. Casualty Insurance Company, 134 F. 2d 566, 568, it is stated that one's "vocation" is the activity on which he spends the major portion of his time and out of which he makes his living.

"Vocation" has also been defined as one's regular calling or business: Mutual Life Insurance Company of N.Y. v. Enecks, 41 Ga. App. 644, 154 S.E. 198; as an employment, occupation, calling, trade, including professions as well as mechanical occupations: Village of Dodge v. Guidinger, 87 Neb. 349, 127 N.W. 122; as a calling, a systematic employment: Miller v. Stevens, 224 Mich. 626, 195 N.W. 481; and as a calling or occupation or business in which one engages more or less regularly: Frierson v. Ewing, 32 Tenn. App. 366, 222 S.W. 2d 678.

The word "employment" has been defined to mean the ordinary relationship between an employer and an employee. In Kateman v. Zink, 238 Mo. App. 253, 180 S.E. 2d 253, the Court said:

"The word 'employment,' not being a technical word, must be taken as having been used by the Legislature in its ordinary sense as meaning the relation of an employee to an employer in the usual and customary manner; that is to say, a regular hiring of an employee able to work and earn wages in the same manner as other employees. . . . It is not possible or wise to give a strait-jacket definition of such language to be applied unrelentingly in every case."

In Kentucky Cottage Industries v. Glenn, 39 F. Supp. 642, 645, in defining the term “employment,” as used in the Social Security Act, the Court held that the meaning of the word in its natural sense was intended to describe the conventional relationship of employer and employee. To the same effect, the Restatement of Agency states in Section 228 as “. . . ‘employment’ means the subject matter as to which the master and servant relationship exist.”

There are literally hundreds of cases in which these terms have been defined. Particular minor differences or variances obtain, depending on the statute being interpreted, and the contexts in which these words appear. However, the foregoing cases define these words in broad language, and it would appear that the broadest and most general definition should be applied to these terms in construing the Securities Exchange Act of 1934.

An executor (or administrator) is not a mere employee: Grafmiller’s Estate, 27 Cal. App. 2d 253, 81 P. 2d 181. An executor is neither an agent of the estate: Goetzmann v. Gazett, 172 Minn. 68, 214 N.W. 895; nor of the deceased: Henry v. Henry, 73 Neb. 476, 103 N.W. 441.

On the contrary, an executor of an estate is a fiduciary. He is a trustee of the assets of a decedent’s estate. As an officer of the court, he occupies a fiduciary relationship to all parties in interest: Larrasee v. Tracy, et al., 21 Cal. 2d 645, 134 P. 2d 265.

It is not believed that the performance of the duties of an executor are either a business, a vocation, or an employment within the usual and ordinary meanings of those terms.

Rule 1(a) of the Rules of Conduct currently in effect provides:

“It is deemed contrary to Commission policy for a member or employee of the Commission to --

(a) engage, directly or indirectly in any personal business transaction or private arrangement for personal profit which accrues from or is based upon his official position or authority or upon confidential information which he gains by reason of such position or authority;”

It does not follow that a commissioner acting as an executor would necessarily obtain a “personal profit” based upon “his official position or authority or upon confidential information” obtained “by reason of such position or authority.”

The second part of Section 4(a) of the 1934 Act prohibits a commissioner to participate “directly or indirectly in any stock-market operations or transactions of a character subject to regulation by the Commission pursuant to this title.” So far as functioning as an executor, in a particular case, might transgress this part of Section 4(a), the statute prohibits the activity. However, a commissioner acting as an executor would not of necessity engage in the prohibited activity. Consequently, it is not believed that a commissioner’s functioning as an executor per se is prohibited by Section 4(a) of the 1934 Act.

Consistent with this interpretation is Rule 3(c) of the Rules of Conduct, which states:

“Any member or employee who is a trustee or other fiduciary or a beneficiary of a trust or estate holding securities not exempted by paragraph (n) of Rule 3 shall report the existence and nature of such trust or estate to the Director of Personnel, together with such further information as may be requested from time to time. The transactions of such trust or estate shall be exempt from the provisions of Rule 3 except to the extent that the Commission shall otherwise direct in view of the circumstances of the particular case.”
(Emphasis supplied.)

It follows from this section of the Conduct Rules that if a commissioner acts as an executor he is obliged to comply and report in the event that among the estate assets there are securities not exempt under Rule 3(n). Also, in a particular case, the Commission has residual power to control the exemption stated in Rule 3(o), if it appears necessary to do so.

In summary, there is no prohibition in the general statutes of the United States and no clear prohibition in the 1934 Act which precludes a commissioner from acting as executor. In a particular case it may well be that a “conflict of interest” could develop. However, each case should be decided upon the facts of the case.

Neither is it believed that any moral or ethical, as distinguished from legal, reason exists which would prohibit a commissioner from acting as an executor. There does not appear to be any reason why, in this situation, the moral or ethical standard should differ from the legal standard.