

COPY

MEMORANDUM

May 6, 1957

To: Thomas G. Meeker, General Counsel
From: Ellwood L. Englander, Attorney
Re: Opinion concerning the Legality of Ownership of Registered Securities
by a Commissioner

Mr. Scheidenhelm has asked whether Section 4(a) of the Securities Exchange Act of 1934 prevents a commissioner from owning securities registered on an exchange pursuant to that Act.

Section 4(a) of the Securities Exchange Act of 1934 provides, inter alia, that no commissioner shall "participate, directly or indirectly, in any stock-market operations or transactions of a character subject to regulation by the Commission pursuant to this title. ***".

On a previous occasion in connection with another opinion, we had occasion to examine the legislative history of this provision, but we found nothing which would throw any light on the question.

It seems clear to me that this provision was never intended to prohibit a commissioner from holding securities for investment in the same manner as any other citizen. It seems extremely unlikely that Congress intended to make any such prohibition. If that were the intention of Congress, it would have been much easier and simpler to draft the provision in unequivocal terms in preference to the language quoted above.

The significant term, I believe, is the word "regulation." It should be recognized that the Act is partly a registration and disclosure statute and partly a regulatory one. For example, Section 10 is headed "Regulation of the Use of Manipulation and Deceptive Devices." Section 9 is headed "Prohibition Against Manipulation of Security Prices."

Obviously it is just as illegal for a commissioner to engage in prohibited operations as it is for any other person to do so. But an examination of the statute will reveal that many of these prohibitions are not absolute ones but leave to the Commission a discretion to issue regulations which will limit such activity. It seems clear, therefore, that Section 4 is intended to prohibit commissioners from engaging in various types of stock-market operations, which are subject to regulation by the Commission but which may nevertheless be entirely legal if effected by non-governmental persons.

The regulatory provisions of the statute, however, would have no applicability to the ownership of securities merely to the extent that they are listed on an exchange. If the Congress had intended to preclude ownership of such securities by a commissioner, there does not seem to be any valid reason why it should have made a distinction between securities registered under the 1934 Act and those registered under the 1933 Act. Indeed, insofar as securities registered under the 1934 Act are seasoned securities which may have been outstanding for many years, there would appear to be less reason to restrict them than in the case of securities registered under the 1933 Act which are being sold to the public pursuant to underwriting agreements, stabilization practices, etc., and may, to a greater degree, be of a speculative nature. The fact that Section 4(a) makes no reference to the 1933 Act which is basically a disclosure statute in which regulatory features are almost non-existent, in support for the view that Congress, in using the term "regulation", did so advisedly.

This has been the consistent interpretation of Section 4 ever since the Commission was created. In promulgating the Conduct Rules, the provisions of Rule 3 indicate clearly that this is the formally adopted view of the Commission. It should be noted that unlike certain other provisions of the Conduct Rules, which are applicable only to employees, Rule 3 applies to all transactions affected by a member of the Commission as well as an employee. The provisions which restrict the type of security which may be purchased by a Commissioner necessarily imply that other types of securities may properly be purchased or owned by a Commissioner including securities registered or an exchange.

It is true, of course, that an interpretation of the statute by the Commission is not necessarily conclusive. However, at the time these rules were adopted in 1953, copies thereof were distributed widely and on February 20, 1953, Senator Douglas obtained consent from the Senate to reprint the entire regulation in the Congressional Record. On the same day Senator Douglas made a statement commending the Commission on the adoption and promulgation of this regulation. The silence of Congress, of course, does not have the effect of law but considerable weight may be given to the fact that no member of Congress has indicated any dissatisfaction with the Commission's interpretation.

In my opinion, except to the extent that there is any restriction in Rule 3 of the Conduct Rules, and except for other considerations of propriety or ethics in an individual case, a commissioner may purchase and hold any security registered under either the 1933 or 1934 Act.