SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF THE
GENERAL COUNSEL

Legal Ethics Committee
District of Columbia Bar
Woodward Building, Suite 840
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Washington, D.C. 20005

Re: Tentative Draft Opinion in Response
to Inquiry No. 19

Dear Sirs:

The Securities and Exchange Commission submits the following comments regarding the Tentative Draft Opinion in Response to Inquiry No. 19 of the Committee on Ethics of the District of Columbia Bar. Having considered the opinion carefully, the Commission can neither support its rationale nor its intended result. We are deeply concerned that the proposed restrictions on the subsequent employment of federal government attorneys would prove antithetical to the public interest by sharply limiting the Commission's ability to attract and retain talented and motivated attorneys. Moreover, the Commission believes that the perceived problems that prompted the proposal of this Tentative Draft Opinion can and should be resolved on a more selective basis.

The draft opinion is purportedly in response to the following fact situation: two members of the D.C. Bar, A and B, have entered into a partnership. They represent a contractor in negotiations for a contract renewal with a government agency. A had served as administrative head of the department in the agency which administers the contract negotiations, and in that capacity, had signed off on a memorandum recommending that the original contract be approved. B was, at the same time, head of the legal department that advised persons in A's office about prospective contracts. He has no specific recollection of participating in discussions concerning the original contract, but it is quite likely that he may have personally approved the legal sufficiency of the contract.

The Tentative Draft Opinion does not deal with this fact situation directly, but assumes that one of the lawyers is barred from participation in the renewal of the contract by virtue of Disciplinary Rule 9-101(b) under the Code of Professional Responsibility, and one is not barred. It then proceeds to discuss in a general way the complex question of the movement of lawyers between the public and private sector. The opinion concludes that protection against the "appearance of impropriety" requires that all counsel associated with an attorney who is personally disqualified from participating in matters because of his responsibility for those matters during his government service likewise must be completely disqualified from representation on those matters.

The Tentative Opinion Is Neither Analytically Sound Nor the Proper Approach to Addressing the Perceived Problems that Prompted Its Proposal

The Tentative Draft Opinion represents a substantial departure from the approach adopted by other bodies that recently have considered this issue, including the Ethics Committee of the American Bar Association. See Formal Opinion No. 342, 62 ABA Jour. 517 (1976). This approach is that the problems associated with representation by law firms in matters in which a lawyer associated with the law firm participated while in the government can be solved by screening the former government attorney from participation in the matter and obtaining the consent of the federal agency involved that its interests will not be adversely affected by the firm's representation in the case. In view of this discrepancy of approach, and of the substantial limitation the Tentative Draft Opinion imposes on the ability of the federal government and private parties to obtain the services of talented and knowledgeable legal counsel, the Commission could only support this approach if convinced that the opinion were analytically sound and that it represented the most effective practical method of dealing with problems of substantial magnitude. Unfortunately, neither is the case. Instead, we believe that the opinion responds to hypothetical and exaggerated problems and imposes restrictions substantially in excess of those actually required. The Commission therefore respectfully urges that the Ethics Committee modify its Tentative Draft Opinion to reflect a result similar to that of the American Bar Association in Formal Opinion No 342.

The result proposed by the Tentative Draft Opinion is predicated almost exclusively on the need to observe the ethical maxim that an attorney should avoid the "appearance of impropriety." This is an important consideration, essential to the maintenance of public confidence in the integrity of the legal profession. The Commission strongly believes, however, that the conditions suggested by the American Bar Association on the employment of attorneys associated with an attorney disqualified by virtue of his "substantial responsibility" over a matter during his government service are adequate to protect against actual abuse as well as any reasonable perception of "appearances of impropriety" that may exist. The Commission respectfully suggests that the Bar should educate the public to the existence and efficacy of the many limitations on the employment of former government attorneys and those associated with them rather than be governed by possibly nonexistent or ill-founded misperceptions of impropriety.

As a preliminary matter, the Commission questions whether some of the perceived abuses advanced in the Tentative Draft Opinion are matters of sufficient substance to justify the absolutist response posed in that Opinion. For example, we question whether many members of the public at large actually believe that government attorneys institute government action to obtain discovery or some other advantage against a defendant in subsequent private litigation, or to create subsequent employment opportunities in upholding or upsetting that action. Even if some members of the public do in fact harbor such suspicions, we doubt that even the restrictions suggested in the Tentative Draft Opinion would assuage their concerns, and, more importantly, we believe it unwise to tailor employment restrictions in response to such an amorphous constituency.

On the other hand, "buying the government's best people" or "switching sides," are also matters of particular concern to the Commission. While we can appreciate that we may not always be able to detect instances where those abuses have occurred, we are aware of only rare instances involving private law firms engaging in this tactic. Accordingly, it seems to us that the proposed solution -- the broad imputation of disqualification to the former government attorney's new associates -- is an overreaction, and a cure far worse than the the illness.

Finally, some of the other perceived abuses advanced in justification of the total restriction on employment of associates of former government attorneys are addressed specifically by other Canons of Ethics and Disciplinary Rules. For example,

the concern for maintaining confidentiality and avoiding unfair advantage of one party over others exists in the private sector as well, and is addressed by Canon 4 and the Disciplinary Rules promulgated thereunder. See Opinion 73-1 of the Committee on Professional Ethics of the Federal Bar Association, 32 FBJ 75 (1973), which holds that the client of the federally employed lawyer, for the purposes of ethical considerations, is the agency where he is employed.

The Commission therefore believes that a closer examination of the perceived abuses advanced in support of the absolute disqualification of attorneys associated with former government attorneys reveals that these abuses are more hypothetical than real. If "appearance of impropriety" is to provide a meaningful analytical basis for imposing restrictions on the employment of attorneys associated with former government attorneys, they must be substantially related to the actual potential for abuse in particular cases. As Mr. Monroe H. Freedman, Dean of the Hofstra University School of Law and former Chairman of the Ethics Committee of the District of Columbia Bar, recently indicated in discussing an analogous situation, attorneys should not be required to tailor their conduct to "avoid even the hint" of impropriety. Rather, as Dean Freedman recognized, "[t]he only time the appearance of evil is improper is when there is some foundation for it in reasonable people who know all the facts." Students Hear Dean Defend Bergman Role, New York Times, Sept. 2, 1976. 1/ We agree, and thus believe that to the extent that some members of the

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1/ The Court of Appeals for the Fifth Circuit recently reached a similar conclusion while recognizing the importance of avoiding appearances of impropriety, noting:

> "It does not follow, however, that an attorney's conduct must be governed by standards which can be imputed only to the most cynical members of the public. Surely, there can be some objective consent in any inquiry whether the 'appearance of justice [or propriety] has been compromised in a given case.' Consequently, while Canon 9 does imply that there need be no proof of actual wrongdoing, we conclude that there must be at least a reasonable possibility that some specifically identifiable impropriety did in fact occur."

Woods v. Covington City Bank, C.A. 5, August 11, 1976, Slip. Op. at 5280-81 (citations omitted).

public may perceive possible appearances of impropriety that are substantially out of proportion to the actual potential for abuse, the Commission respectfully suggests that the proper response is to educate those persons to the actual facts rather than be governed by their misperceptions.

Screening Procedures Similar to Those Endorsed By the ABA Suffice to Protect Against Actual and Apparent Abuse

The American Bar Association, which recently considered this same problem, concluded that actual and reasonably perceived abuses stemming from cases in which former government attorneys associate with law firms representing clients in matters over which they had "substantial responsibility" while in the government can be avoided by screening the former government attorney from participation in the matter and obtaining the consent of the federal agency involved that its interests will not be adversely affected by the firm's representation in the case. 2/ Our experience in dealing with matters of this nature convinces us that that conclusion is indeed correct.

The Commission has had many years of experience dealing with the question of representation of private parties by former Commission members and employees, and has had to grapple with the same problems that the Draft Opinion

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2/ The American Bar Association concluded:

> "[I]t is our opinion that whenever the government agency is satisfied that the screening measures will effectively isolate the individual lawyer from participating in the particular matter and sharing in the fees attributable to it, and that there is no appearance of significant impropriety affecting the interests of the government, the government may waive the disqualification of the firm under DR 5-105(D). In the event of such waiver, and provided the firm also makes its own independent determination as to the absence of particular circumstances creating a significant appearance of impropriety, the result will be that the firm is not in violation of DR 5-105(D) by accepting or continuing the representation in question.
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> "[E]ach lawyer should advise a potential client of any circumstances that might cause a question to be raised concerning the propriety of his undertaking the employment and should also resolve all doubts against the acceptance of questionable employment." Formal Opinion No. 342, 62 ABA Jour. 517, ___(1976).

discusses. We believe that our resolution of those complex problems represents the proper approach in the area. Thus Rule 6 of the Commission's Conduct Regulations, 17 CFR 200.735-8, like DR 9-101(B), imposes a lifetime bar on representation in a matter by an attorney who considered the matter while at the Commission. However, our rule goes even further than the Disciplinary Rule. A former member or employee of the Commission may not, for a period of one year, represent anyone before the Commission in a representative capacity in any matter which was under his official responsibility during the last year of his tenure at the Commission. Any former member or employee who, within 2 years after his association with the Commission, is retained in a matter where he will appear before the Commission, must file a statement of the intended employement with the agency so that we may evaluate the appropriateness of his representation. Moreover, these restrictions are broadly construed by the Commission and in pari materie with the federal conflict of interest laws, 3/ which are very similar. For example, our position is that a former Commissioner would have had "official responsibility" for every matter of any kind that was pending at the Commission but which never came to the attention of the Commission, including those resolved at the staff level pursuant to authority delegated by the Commission. Further, the Commission has taken the position that a former member has a lifetime ban precluding his involvement in any matter that came up for a Commission vote and as to which the minutes do not reflect the absence of the Commissioner, irrespective of whether the former Commissioner may recall the matter. Similarly, with respect to members of the staff, especially supervisors at all levels, we interpret our regulation in a manner intended to preclude all reasonable possibilities of conflict of interest. Finally, we consider as "appearing before the Commission" any transaction of any business with the Commission or staff, as well as the preparation of any statement, opinion or any other paper prepared by an attorney and filed with the Commission in any registration statement, notification, application, report or other document with the consent of the attorney.

3/ 18 U.S.C. 201 et seq.

The reason that these regulations have been construed as broadly as they have been is the belief by the Commission that in view of the fact that ethical considerations are involved, close questions should be resolved against representation. However, the Commission has never had occasion to believe that the disqualification of former members or employees should, in all cases, be extended to their associates, provided that the Commission is adequately assured that its former member or employee will be totally insulated from participation in the matter. In connection with this latter requirement, the Commission has considered several factors, including, for example, the size of the law firm and whether the firm had an existing securities law capability before employment of the former Commission lawyer. We believe that our experience in administering these regulations affords convincing evidence of their efficacy in preventing actual or perceived abuses by former Commission members or employees and attorneys associated with them.

Further, the Commission believes that the criticisms of screening procedures set forth in the Tentative Draft Opinion are not persuasive. Thus, although the Draft Opinion criticizes screening on the ground that it fails to deal with the problem of the government lawyer's ingratiating himself or herself with a potential private employer, it earlier states with respect to that same problem that it "is probably dealt with adequately by individual disqualification, without disqualifying the entire firm." Other criticisms, notably that screening is an inadequate measure to protect against favoritism to firms that former government attorneys join or the problem of law firms "hiring away" key personnel, are similarly not really criticisms of screening but merely restate the perceived abuses associated with the interchange between the public and private sectors of the legal community. Although screening admittedly does not alleviate those perceived abuses, no solution short of binding a government attorney to the government for a period of years or life would adequately deal with them, and accordingly, it does not seem appropriate to criticize screening on those grounds.

The concern that screening is inadequate to protect against the possibility or perception that former government employees might pass along agency secrets also does not provide an adequate rationale for rejecting that procedure. The screening procedure is, in essence, a form of waiver exercised by the interested agency. This affords the agency as the party whose

interest would be directly affected the opportunity to assure itself that its secrets well not be communicated. 3/ Additionally, the Commission and probably most if not all other agencies of the federal government have specific regulations prohibiting the divulgence of secret information obtained during the course of federal employment. See 17 C.F.R. § 735.3(d).

The Commission's experience is that it can trust its former members and employees when they represent that they will not discuss at all with their new colleagues in the law firm or with the client of the firm any matter as to which they had substantial responsibility while at the Commission. Moreover the question of communication of confidences or secrets with clients is specifically addressed in Canon 4, and as noted, the client of the government attorney is the agency where he works. We believe it is insulting to imply, as the Draft Opinion does, that Canon 4 is sufficient protection against this abuse for private lawyers, but that additional protection is necessary in the case of the class of government lawyers.

Finally, the Commission considers the rationale that the drafters of the Tentative Draft Opinion seem to have considered the most compelling -- that government attorneys called upon to pass judgment of particular screening procedures necessarily are implicated in serious conflicts of interest because they are called upon to decide cases which might have precedential effect if they were to request a waiver in the future -- to be both erroneous and insulting. This criticism of screening largely misperceives the nature of the judgment that an attorney must exercise when called upon to resolve a screening issue. It is a fact-specific determination, and any resolution in one case is most unlikely to have any precedential effect for future cases. Thus, the liklihood that an attorney would perceive that his personal interest in a future determination of his own case would be served by any particular ruling is most remote, and certainly pales by comparison to his interest in assuring that former government attorneys do not impair his agency's efforts.

3/ We note that Congress reflected a similar view in providing for waiver by the government of the analogous criminal prohibition against certain activities of former government employees. See 18 U.S.C. §207(b).

The Commission also feels that reliance on this rationale degrades the competence and integrity of attorneys serving in government. Certainly these attorneys can be regarded with equal esteem as those practicing in the private sector who, in particular cases, are relied upon to determine whether their personal interests would render them unable to offer an objective judgment and, if so, to decline to accept employment in those matters. Indeed, we fail to understand how the operation of the screening device differs in this respect from other examples of persons who decide issues that may, in the future, have an impact on their own personal careers -- persons such as those practicing lawyers who sit on Ethics Committees and interpret canons of ethics.

The Tentative Opinion Will Substantially Limit the Commission's Ability to Employ And Retain Talented Attorneys

The most unfortunate aspect of the Tentative Draft Opinion is that, under the guise of interpreting ethical rules, the opinion in reality attempts to resolve very complex questions concerning the desirability or undesirability of movement of lawyers between the public and private sectors. Moreover, the opinion displays a startling unfamiliarity or lack of concern with one side of that larger policy question. We urge the Committee to reconsider its opinion to reflect a more balanced and aware approach to the many aspects of this question.

Although the process of interchange between the private and public sectors can, as the Tentative Draft Opinion indicates, lead to abuses in some cases, it does have several positive features that are never adverted to in the Tentative Draft Opinion. First, it insures that the government can continue to attract quality persons. The Commission is proud of its past record of achievement in the promotion of the public interest and the protection of investors and is determined to maintain that record. This standard of performance can only be sustained, however, if the Commission can continue to attract attorneys and other professionals of the highest caliber. Unlike many government agencies which primarily deal with issues that concern only the government, the Commission has a substantial private sector counterpart which deals with securities questions. Consequently, the Commission's ability to attract quality people depends to a large extent on the ability of those people to find subsequent employment in the private sector.

Many offices and Divisions of the Commission seek a three year commitment from attorneys accepting employment, considering that to be an appropriate balance between the Commission's need to maximize the services it might obtain from more experienced personnel and the diverse interests served by professional mobility. We, of course, expect that many will remain with the Commission for a substantially greater period of time, and many in fact do. We realize however, that the financial and geographic constraints of service with the Commission, combined with the natural desire of many talented individuals to vary their professional experiences and accept new challenges, prompts the majority of attorneys serving at the Commission to leave the Commission eventually to accept employment with private law firms, the private sector, or the academic community. No doubt, many young attorneys are attracted to government service out of a sense of altruism and a zeal to serve the public interest, and we search for such persons. But we are realistic enough to know that, with respect to most new lawyers, if they cannot be assured that they will not be burdened by unnecsssarily harsh limitations on their eventual subsequent employment, they may not choose to forego the superior financial benefits they could command at some of the nation's law firms in favor of service with the Commission. 4/

Further, the interchange of lawyers insures that the Commission will continually be exposed to new perspectives and approaches to the complicated and evolving problems that it must confront. In addition, the departure of personnel helps enable the Commission to continue to offer one of the important benefits that attracts and motivates persons contemplating serving in federal agencies -- the ability to exercise significant responsibility over matters of substance at an early stage in one's professional career.

The Commission further believes that the interchange of personnel between the public and private sectors serves the public interest by insuring that individuals and entities subject to federal regulation have an available source of

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4/ We note, for example, that the starting salary for recent law graduates in many large New York City law firms is $25,000. The Commission, by contrast, can only offer recent law graduates that qualify for our honors program approximately $16,000. The Commission competes directly with those firms for the top law school graduates.

counsel that are knowledgeable in the complicated technical issues that can arise. Moreover, we also believe that entry of former Commission attorneys in the private sector also serves to enhance the private bar's appreciation of the nature and importance of the concerns embodied in the federal securities laws. A substantial number of the attorneys employed by the Commission come to government service immediately or shortly after they finish law school, a period in which one's professional attitudes are just beginning to take form and thus are most impressionable. In our experience, most of that number thereafter enter the private sector with a heightened awareness and sensitivity to the public interest concerns that can be of critical importance even in the representation of the occasionally more parochial interests of particular clients. We consider this to be a substantial benefit both to the Commission and the public at large.

The result reached by the Tentative Draft Opinion jeopardizes the ability of the Commission and the public to reap these benefits of relatively free interchange of lawyers. The practical effect of this Opinion will be to render many attorneys effectively unemployable by Washington law firms that have been, or anticipate being, called upon to render legal services in particular matters over which those attorneys had "substantial responsibility" during their government service.

Under the circumstances, the young attorney out of law school would be forced to make a career choice between public and private employment before he or she had any practical experience with either. Moreover, the government attorney would be forced to renew that election at each juncture of his agency career. While some attorneys might be willing to accept government service at lower echelons, where the matters over which they exercise "substantial responsibility" are very few, not many would be willing to accept promotions to supervisory positions where their participation would "taint" a much larger number of matters, thereby substantially reducing future employment opportunities. Finally, those few who do decide to make a career out of government service are rewarded under the Draft Opinion with the risk that, should they be forced out of service because of political or

personal reasons, they may be unable to find employment. We consider this a severe sacrifice to be foisted involuntarily upon lawyers who entered government service in reliance upon the long-followed practice and belief that their career options of entering private practice in Washington, D.C. would not be cutoff.

As Judge Kaufman noted in United States v. Standard Oil Co., 136 F. Supp. 345 (S.D.N.Y., 1955):

> "If service with the government will tend to sterilize an attorney in too large an area of law for too long a time, or will prevent him from engaging in practice in the very specialty for which the government sought his service -- and if that sterilization will spread to the firm with which he becomes associated -- the sacrifices of entering government service will be too great for most men to make. As for those willing to make these sacrifices, not only will they and their firms suffer a restricted practice thereafter, but clients will find it difficult to obtain counsel, particularly in those specialities and suits dealing with the government."

We recognize that persons can have differing views about the desirability of a career corps of government attorneys. Certainly career attorneys provide an invaluable service to the federal government; perhaps few federal agencies demonstrate this fact better than the Securities and Exchange Commission. But the relatively free exchange between the public and private sectors also has great benefits; the bright and aggressive corps of young attorneys at the Commission which is made possible by that policy also demonstrates this fact. In short, the entire area involves many complex policy considerations which raise fundamental questions about the efficacy and function of the government. We do not believe that is is appropriate or beneficial for the Ethics Committee of the D.C. Bar to attempt to resolve these questions through the device of interpreting ethical rules. Accordingly, we urge that the D.C. Bar adopt a standard consistent

with the approval of the American Bar Association's Ethics Committee, which we believe represents, a sound balancing of interests.

Sincerely yours,

Harvey L. Pitt
General Counsel