

GOOD PEOPLE, IMPORTANT PROBLEMS AND WORKABLE LAWS

[by A.A. Sommer, Jr. Delivered to the U.S. Securities and Exchange Commission, 1984]

It is a great privilege in any event for me to be here at this annual highpoint of the Commission year. It is an even greater pleasure and privilege to be here in the year in which the Commission has celebrated its 50th anniversary.

As Frank Wheat pointed out recently, "whenever two or more old SEC hands get together, with or without martinis (parenthetically it is hard to think of martinis without thinking of the late beloved Ray Garrett), they usually fall to reminiscing about what happened when they were there."

I'm no exception to what might be called "Wheat's law." The last time I spoke to a large group of staffers was when I took leave of the Commission in April 1976; the time before that was when I joined the Commission in August 1973. In between there were the three years of my life in which joy and satisfaction and happiness peaked, the three best years of my life. I expressed that judgment of the years in April 1976; nothing since then has caused me to modify that judgment in the least. It is not to flatter that I say the biggest reason for that were the free-wheeling, enormously stimulating, utterly delightful times I had working with the staff -- indeed, "good people" -- on, indeed, "important problems." Were I to let nostalgia run free, you would miss lunch, dinner and more, and I would "get the hook." But surely simply a partial enumeration of some of the "important problems" of that day will evoke in many of you vivid memories: questionable payments, fixed commissions, the '75 amendments, municipal securities. "Good people": Harvey Pitt, Alan Levenson, Aaron Levy, Syd Mendelson, Lee Pickard, Sandy Burton and so many, many others, not to mention my colleagues on the Commission: Garrett, Hills, Pollack, Owens, Evans and Loomis.

People often asked when I was on the Commission why I had accepted the position. I usually recited the conventional litany of reasons: great chance to learn, opportunity for experience in the government, and on and on. And sometimes I would tell them the real reason: I got tired of feeling left out, I got tired of seemingly being the guy on campus who wasn't a member of the fraternity. I envied all those I knew who belonged, who had sat behind desks at 425 Second Street or 500 North Capitol or even the Pennsylvania Athletic Club on Rittenhouse Square in Philadelphia (thank heaven no one sits behind a desk on Buzzards' Point as a result of events during my time!). I truly yearned to be one of that enviable crowd, those who had served the Commission. They were indelibly marked in my eyes, not because they knew rich secrets, but simply because they belonged. And they carried that mark into the ranks of a distinguished alumni group bound together by reverence for the institution they once served, memories of camaraderie, arguments, struggles with seemingly

insoluble problems, pride in finding solutions, and a sense of a worthy, important task undertaken and done.

The invisible bond that binds those who have left the Commission to it as long as they live is real. The profound respect all of us who have served have for the Commission survives battles with the Enforcement Division, sometimes deeply felt convictions that the Commission or the~ staff are wrong as can be, and the constant belief that if we were there things would be different --and better! Even those like my dear and respected friend, Homer Kripke, who believe that somewhere in the distant past the Commission lost its bearings, admit to a great affection for the Commission and its people, benighted though they may think we were and you still are!

The Commission alumni are unique and I would venture to say they are one of the reasons for the unusual success of the Commission through the years. As long ago as 1934, John Burns, who was the first general counsel of the Commission, recognized their role, when in a letter to Felix Frankfurter he quoted Jerome Frank, an early chairman of the Commission:

[W]henever a man trained at the commission goes into private practice, either at the Bar or in corporate finance, the problem of mutual understanding between business and the commission is to a great extent simplified. Such a man can acquaint his . . . client with procedures and practices of the commission much better than a person who has not had the benefit of that experience.

Half a century later those words have only gained in validity and veracity.

But as important as the alumni are and were, and as important as the service to the Commission of those of you who will become alumni is, there is another group that transcends everyone in importance, and those are the people, happily a goodly number, unhappily probably fewer than before, who have made the Commission their careers, and have made magnificent marks by their work. Their names are unquestionably the brightest in the SEC firmament: Manny Cohen, Barney Woodside, Phil Loomis, Irv Pollack, Orval DuBois, Ruth Appleton, Charlie Shreve, Andy Barr, and so many others. They are foremost among the inhabitants of the pantheon of SEC heroes.

What is it that has bound these alumni together among themselves, and bound them to all of you and those who will succeed you, in a manner that is not there for any other governmental agency? God knows it has not been the fond memory of great pay, luxurious quarters, extensive perks, abundant parking, outstanding cuisine in the snack bars. Nothing tangible or material could weave that bond.

Its origins, I think, go back to the very beginnings of the agency. "Good people" flocked to Washington, anxious to have work, true, but even more anxious to have a hand in creating the "city on the hill" limned by the words of President

Roosevelt. And the best of those “good people” found the SEC. And why did they come here? Because nowhere were the challenges greater, for only here was the opportunity to restructure the very heart of America’s economy, its capital markets. No problem was more important. The laws the Commission administered were not workable as they came from the hands of Congress; they became workable because of the imagination, resourcefulness and creativity of the pioneers who, for instance, puzzled over whether, as Congress seemed to intend, they would really have to stop order almost every registration statement until industry and its lawyers learned what it took to pass staff muster. And where in the world was there the opportunity to tear apart an entire industry, perhaps the most important in the country, and put it back together in a way that served the interests of both investors and utility customers? The memory of that Commission achievement was still so alive on the Hill when I was here that it was once proposed then that the Commission be given the task of doing a similar job with the oil industry! Thank heaven that privilege eluded us.

The commitment, the zeal, the enthusiasm, the vitality of Banes, Burns, Fortas, Loss, Schenker, Johnson and the others passed from generation to generation of staffers and commissioners as one set of important problems succeeded another and another and another.

Either Douglas or Frank -- memory fails to tell which -- once said that every agency should be disbanded after ten years, that by then it would have exhausted its initial vigor and lost its zeal. Thank heaven his advice went unheeded: it would be impossible to create a succession of SECs. But in a sense his aphorism has been true. Congress have not recreated the Commission every ten years; rather the people of the Commission have recreated it year after year so that it has never exhausted its early vigor or lost its zeal.

Daniel Boorstin who works up the street a bit at the Library of Congress has said that the act of creation is the most mysterious trait of the human species. If that is so, certainly at the top of the list of creativities is the kind of creativity that spawns institutions and then adapts and renews them year after year, generation after generation. That creative renewal is the chore you have, and which you and your predecessors have done so well for half a century.

In a time of distrust of government and of institutions in general, it is great that there is an institution, and a government one at that, of which it can be said, as it has recently by the author of Wayward Capitalists,

At last the role and function of the SEC becomes clear. It is the symbolic guarantor of trust in securities. The creation of the SEC was a clever innovation. It allowed the government to fabricate and guarantee the trust that the securities markets had lost. But the agency’s initial promises of trust were only provisional; ultimately the SEC had to earn the trust of securities investors by deed rather than word. So far the agency has performed well. Where other regulatory

agencies have consistently earned the mockery and distrust of the American public, the reputation of the SEC has remained relatively untarnished and its role as symbolic guarantor of trust in the securities markets unquestioned.

What are the important problems this generation of SEC staff people -- you -- must confront? They are not lacking in number or importance. Insider trading is a perennial problem. I commend this Commission for the priority it has given this battle. It has always seemed to me that the enormous effort and expense of the remarkable disclosure system developed and administered by the Commission can be brought to naught by unscrupulous insiders and tippees who need no information more than a tidbit of inside information to realize profits far beyond the dreams of those who rely on the disclosure system. With the new weapon of triple damages I would hope that the Commission may make further inroads into this nefarious practice. It is a cancer that gnaws at the vitals of a healthy market system. It must be eradicated. Only the Commission can do it.

Any businessman will tell you that competition in our economy has never been more intense, the fight for profits more brutal, the pressure for performance higher. More is demanded of management at every level. In such an environment the temptation to "fudge" figures is great, indeed, overwhelming. While we may sympathize with the division manager who sees his career poised on an income statement for a brief period, our sympathy cannot countenance distortions of earnings to the detriment of investors. The Commission must be vigilant in these times to assure that financial statements have integrity and do not reflect a "cooking" of the books.

Every day brings new evidence of the fact that markets are increasingly international. Manny Cohen a decade ago said the international market for securities was an idea whose time has come. More than then that is now true. The problems are enormous and of a kind the Commission is not accustomed to dealing with. But deal with them it must. The problems embrace the regulation of markets, accounting principles and auditing practices, enforcement, investment company regulation -- in truth, every activity of the Commission is affected by this worldwide expansion of regulatory concerns. The Commission must commit the resources, the imagination, and the creativity in solving these problems that it committed in resolving past problems confined to our country.

In the next Congress the Commission will again be confronted with the challenge of providing guidance to Congress as it wrestles with the problems of tender offers. The Commission must be a leader in addressing the many and complex problems posed by this phenomenon. It must peer beyond the popular hostility to some of the defense tactics imperiled companies use and ask the more basic questions, such as whether tender offers are a luxury we can afford, particularly when heed is given Chairman Shad's searching analysis of the "leveraging of America."

And the Commission must decide its role in corporate governance. Can it be content with simply amplifying disclosure of conflicts, or must it seek a broader mandate to move corporations to higher levels of sensitivity and concern for these matters. The present effort of the New York Stock Exchange, an effort I am associated with, to deal with the increasing number of companies that are willing to forfeit their Exchange listing for the protections A and B stock configurations give them against unwanted offers raises forcibly the question whether the Commission can rightly step aside and witness a new "race to the bottom."

These are only some of the "important problems" that confront you. Some of them will remain to confront your successors. But as the pace of change in our society quickens, the Commission no longer has the luxury of mulling these problems for years. Decisions must be forthcoming sooner, otherwise solutions will be obsolete before they emerge. As I said at the Major Issues Conference in June, the Commission's failing has not been in what it has done; rather it has sometimes been in the speed with which it has done right and good things.

You are the heirs of a great tradition, and I know well that you are worthy heirs. Your pride in the Commission is as high as any of your predecessors, your integrity is unmatched anywhere in this city, your commitment is as real as was that of your predecessors in 1934. I am proud to be one with you in celebrating here, by honoring those backbones of this agency, the staff members, the work and achievements of the Securities and Exchange Commission.