NOMINATION OF BARBARA S. THOMAS

HEARING

BEFORE THE

COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS UNITED STATES SENATE

NINETY-SIXTH CONGRESS

SECOND SESSION

ON

THE NOMINATION OF

BARBARA S. THOMAS TO BE A MEMBER OF THE SECURITIES AND EXCHANGE COMMISSION

AUGUST 19, 1980

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NOMINATION OF BARBARA S. THOMAS

TUESDAY, AUGUST 19, 1980

U.S. SENATE,
COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS,
Washington, D.C.

The committee met at 9:35 a.m. in room 5302, Dirksen Senate Office Building, Senator William Proxmire (chairman of the committee) presiding.

Present: Senators Proxmire, Williams, Morgan, Garn, and Kassebaum.

The CHAIRMAN. The committee will come to order.

This morning the committee considers the nomination of Barbara Thomas to be a member of the Securities and Exchange Commission.

Ms. Thomas, will you rise and raise your right hand?

[Witness sworn.]

The CHAIRMAN. We are very honored to have with us a former member of this committee and a very distinguished U.S. Senator, the senior Senator from New York, Senator Javits.

Go ahead, Senator.

STATEMENT OF SENATOR JAVITS

Senator JAVITS. Thank you very much, Mr. Chairman. Mr. Chairman, I deeply appreciate the courtesy, as I have other committee meetings to attend.

Mr. Chairman, I find it singularly rewarding to recommend Barbara Thomas to the committee. I have from very substantial sources in New York, received outstanding recommendations of her. She has been in to see me twice with others who are well known to me and are her clients, and who have recommended her highly for this job. I have been very greatly impressed with this young and attractive woman who has acquired a fantastic legal experience in a relatively short time, 11 years.

It reminds me of the early days of our country when men of considerable youth had very great responsibilities. She is so bright it was almost difficult to believe. So I think she will make an excellent member of the Commission.

The big worry in Wall Street, my hometown, which the SEC operation is designed to monitor, is that it will not be recognized that the American society lives on talent and heavy risk capital. There is no such thing as a safe investment in terms of the inexorable march of time, changes, and the manifold people who always press the line between truth and misrepresentation. And I think we have a singularly able young person trained in a modern school, having been on the side which deals with the SEC, and that can bring a

spirit of modern thinking as well as a thoughtful and highly professional quality to the work of the SEC.

I am especially impressed with her legal education. She went to the same law school I did, many, many years later, of course. But she graduated cum laude, and that's really a pretty classy law school. I think being second out of a class is quite a distinction.

In addition, she has won other honors there which have now been recognized by the organized bar in the short space of a few years. She is now the chairman of the Corporation Law Committee of the Association of the Bar of the City of New York, of which I am also a member. The firm into which she has been admitted as a partner, Kaye, Scholer, Fierman, Hayes & Handler—that's Milton Handler's firm; Milton Handler is one of our most able lawyers, an antitrust lawyer—and the firm in which she got her early training, Judge Rifkind's firm, are both very fine firms and I think their recognition of Ms. Thomas' quality is testimony to what I found in the visits that I had with her as to her professional ability.

And so, without any regard to party or any consideration other than excellence, Mr. Chairman, Senator Garn, I commend Barbara Thomas to the committee for confirmation as a member of the SEC.

The CHAIRMAN. Thank you, Senator Javits.

It's good to have Senator Moynihan here. This brings back memories of only a few months ago when the two distinguished Senators from New York did such a great job helping New York during our hearings on that subject.

Senator Moynihan, go ahead.

STATEMENT OF SENATOR MOYNIHAN

Senator MOYNIHAN. Thank you, Mr. Chairman, Senator Garn.

I would only wish to echo my senior colleague's observations about Ms. Thomas. She has been a most distinguished attorney in New York, following her distinguished academic career—second in her law school class. We will miss her in the city, but we think this is little enough that we might do for the Government and this committee, when you consider what this committee has done for New York. [Laughter.]

The CHAIRMAN. A very eloquent and wise observation. [Laughter.]

For New York and to the taxpayer. [Laughter.]

Thank you very much, gentlemen.

Senator MOYNIHAN. Thank you very much, Mr. Chairman.

Senator JAVITS. Thank you, Mr. Chairman.

The CHAIRMAN. Ms. Thomas, do you have any statement you would like to make?

Ms. THOMAS. No, I do not.

The CHAIRMAN. As has been already noted, you have a most impressive educational background. You were editor of the Law Review, too, as I understand. You have been in private practice for 11 years and you bring both experience, training, and youth to this position, all of which is helpful.

Can you tell us briefly what you feel are your qualifications to be a commissioner?

Ms. THOMAS. Certainly. As Senator Javits was so kind to say, at law school I was second in my class, an editor of the Law Review, and a recipient of the Jefferson Davis Prize in public law, as well as a recipient of the Order of the Coif. Out of my 28 courses I received 15 grades which were the highest in the class, and accordingly, was the recipient of 15 American Jurisprudence Prizes for Excellence in those courses.

During the past 11 years I have specialized in securities and corporate law, first at the Paul, Weiss firm and then at the Kaye, Scholer firm where I am now a partner. I have represented corporate clients both large and small, in a variety of securities and corporate transactions. I have participated in both public and private equity and debt financing and have prepared registration statements under the 1933 act, and private placement memorandums under rule 146.

I regularly prepare and review the 1934 act filing of my clients, including proxy statements, annual reports, forms 10–K, forms 13–D, and the like. I have participated in numerous mergers and other acquisition transactions and prepared the necessary documents to be filed with the SEC and distributed to stockholders.

In general, I have counseled my corporate clients as to how they can carry on their businesses effectively and profitably in compliance with the securities laws.

In addition, as Senator Javits also mentioned, I was a member of and am now chairman of the Corporation Law Committee of the Association of the Bar of the City of New York. This is one of the most significant committees of that bar association, and I believe that I am the first woman chairman of such a committee.

I also am a member of the Securities Committee of the American Bar Association and a charter member of the Securities Law Committee of the New York State Bar Association. I believe that I am an effective and hardworking corporate and securities lawyer and that I would be openminded and independent in my approach to the work of the Commission.

The CHAIRMAN. Can you tell us what type of clients you represented in securities cases?

Ms. THOMAS. Because I am not a litigator I do not handle securities cases; I handle securities transactions. My clients are large corporate clients, institutional investors, and companies that have come to the market for financing for the first and subsequent financings. I also have smaller clients that are just commencing business and I have participated in various start-up activities. I also counsel individuals, principally corporate executives. Would you like the names of my clients?

The CHAIRMAN. I don't think that's necessary. At any rate, you've had a variety of practice in securities law; is that correct?

Ms. THOMAS. Yes, indeed.

The CHAIRMAN. For how much of your 11 years of practice?

Ms. THOMAS. I started out specializing in securities law and have continued, in that practice from the very beginning of my practice.

The CHAIRMAN. Now, you will be filling the seat of a very distinguished and vigorous consumer protector—I should say, one of the premier protectors of the consumer and the investing public, Irving

Pollock. Will you work to protect investors and their interests with the same vigor that Mr. Pollock did?

Ms. THOMAS. I think Irving Pollock with whom I met in connection with the preparation for this hearing, is one of the outstanding public servants of our time. I think we should all be grateful to him for what he has done for the American public.

I, however, hope to come to the Commission with my own qualities. I am, by temperament and training, a strong and independent person and I will try to bring to the Commission that strength and independence. My objective will be to approach all aspects of the position of Commissioner with honesty and integrity and open-mindedness. I will always endevor to make informed and considered judgments but I will in this, as in all things, be my own person.

The CHAIRMAN. I have more questions, but I will yield at this point to Senator Garn.

Senator GARN. Thank you, Mr. Chairman.

As I am sure you know, the Commission has taken a number of steps recently to reduce the regulatory burden on small business. This is something I have been particularly concerned with. I have discussed it at great length with Commissioner Evans.

In adopting rule 242 and S-18 for small business securities offerings, the Commission has excluded limited partnerships from the benefits of the changes. I have encouraged the Commission, both when they have been here before the committee and in other discussions, to consider allowing limited partnerships to use form S-18 since this type of securities offering serves a very important function in my own State and other States in raising capital for use in real estate developments, and particularly energy exploration, as well as in other fields.

Do you believe that extending form S-18 to limited partnership offerings should be actively considered by the Commission?

Ms. THOMAS. I understand that this proposal is now being actively considered. I do believe that the Commission is now monitoring the effectiveness of rule 242 and form S-518, and that there is a report beging prepared on their operation during this first year or two. I also believe the Commission is undertaking a study of whether or not the form and the rule should be expanded to permit use by limited partnerships as well as corporations in the oil and gas industries. I will be quite interested to review the report and to pursue it further with those who are preparing it, in order to make an independent judgment on this question.

Senator GARN. This leads me to a general question. I certainly, as one who has lost money in securities more often than I have made any, certainly am well aware of the responsibilities of the Commission to protect the investor and the consumer as much as possible. But I am also tremendously concerned about the regulatory burden.

How do you feel in this whole general area, notification forms making it easier for people to comply, and expanding from S-18 and 242? What would be your general attitude?

Ms. THOMAS. I believe in the integration and the deregulation process that has been started by the Commission. I think a responsible program of deregulation is necessary now, and that the Com-

mission has been moving in that direction. S-16 and S-18 are both short registration forms for use by different classes of issuers. Large issuers with a known financial history should be permitted to use a short form registration statement like S-16, and as was slated before form S-18 is an excellent aid to financing of small business.

I believe that businessmen are trying to comply with the securities laws and that the Commission ought to make it as easy for them to do so as efficiently as possible. Of course, any revision or promulgation of forms should provide for adequate disclosures. In general, I believe that the Commission's effort in the area is a positive step and I support it.

Senator GARN. The Securities Act Amendments of 1975 require the Commission to facilitate the development of a national market system of securities transactions. I certainly don't expect you today to prejudge any specific issues, but instead provide us some insights as to how you would approach these issues as a Commissioner.

What would be your general approach to Commission decision-making concerning issues to be addressed in implementation of the national market system?

Ms. THOMAS. I understand that the 1975 amendments mandated the SEC to facilitate the development of a national market system; and I believe that the Commission has begun to do that over the past few years. It has been intricately involved with the stock exchanges in the new systems that they have been developing.

I think that the Commission's efforts have been positive. I believe that the SEC should be a facilitator, and a catalyst in this effort, but that the 1975 amendments left the design and construction of the system to the stock exchanges and the industry; and that they are doing a good job in that respect.

The United States has the most sophisticated capital markets in the world. We ought to be very careful as we go along to make sure that what we are doing will be beneficial to the investing public. I believe that the Commission has been doing that and I support the effort.

Senator GARN. Have you taken any positions on behalf of clients on issues arising in connection with the implementation of the national market system?

Ms. THOMAS. No; I never have.

Senator GARN. What other background might you have concerning the national market system issue?

Ms. THOMAS. I really do not have as much background in the national market system as other people who have been studying the issue since 1975 and before. What I would endeavor to do is to study the issue from all sides, obtain as many opinions and judgments as I could on the issue, and then make up my own mind after having thoroughly researched the area.

Senator GARN. Thank you very much.

Mr. Chairman, the time is brief. I may have some other questions that I would submit for answer in writing. But I will yield at this time. [See p. 24.]

The CHAIRMAN. Senator Williams?

Senator WILLIAMS. No questions.

The CHAIRMAN. Senator Morgan?

Senator MORGAN. Mr. Chairman, thank you.

Just let me say to you that we are glad to have you with us. I have read your credentials and they are superb. The only criticism that I have heard of the nomination is one that I used to hear and that I wish I could hear now, that you might be too young. There was a time when that was said about me. But everything that I have heard has been good; and unless something unexpected happens, I expect to support your nomination.

The CHAIRMAN. Senator Kassebaum?

Senator KASSEBAUM. Mr. Chairman, I don't have any comments either. Having read the credentials of Ms. Thomas, I am very impressed with the background that she has, and I think would bring to the Securities and Exchange Commission.

The CHAIRMAN. Senator Williams?

Senator WILLIAMS. I had the opportunity to talk to Ms. Thomas' office. I share Senator Kassebaum's feeling that the background brought to this position is very significant. Her achievements in the financial world as a lawyer working with companies that were involved in equity financing is precisely the kind of background I think we ought to have, and it would enhance the work of the Securities and Exchange Commission.

The CHAIRMAN. Ms. Thomas, you have stressed the fact that you are independent. You are proud of your independence, and I think that's a very important characteristic for members of the SEC.

Incidentally, I think the SEC, in my judgment, is the best agency we have in the Federal Government. I have said that a number of times and I firmly believe it. Of course, how good it is depends entirely upon its personnel, and the Commissioners. But it has a remarkably fine staff and I think that Mr. Sporkin and other staff members have given it a force and integrity that is a fine example for the rest of Government and something of which we are all very proud.

But I want to ask you how committed you are to being an independent member of the Commission who receives independent advice from the Commission staff that is not cleared or advised beforehand by any other office in the Commission. Do you believe that the Chairman's office should review and clear staff memos before they are presented to the Commissioners?

Ms. THOMAS. Let me say first that I agree with you that the Commission has always been one of the premier agencies in Government, and I am certainly immensely impressed with the staff in general and in particular the people that I have met thus far. I have not worked at the Commission, and as yet I have not had an opportunity to understand the internal operation of the Commission. I would want to view personally the operation of the agency before taking a position. But I am, as I have said, proud of my independence and proud of the fact that I try to receive information directly from whatever sources are available; and I would hope that I would continue my tradition of independence if I were to be a Commissioner.

The CHAIRMAN. What would be your responsibility, in your view, as a Commissioner, to assure that you receive the independent views of the Commission staff?

Ms. THOMAS. As in all things, I would try to make sure personally that I was receiving independent views, as I have throughout my career.

The CHAIRMAN. If the opinions of the staff first have to go through the Chairman before you see them, they might be modified in some way. How would you be sure that you are getting a direct opinion?

Ms. THOMAS. As I understand it, there is a very free and open interchange between the Commissioners and the staff. At least, that's what I have been told.

The CHAIRMAN. I think that's right. Would you work to preserve that free and open interchange?

Ms. THOMAS. Yes, indeed.

The CHAIRMAN. Recently there has been concern expressed that section 30(a) of the Foreign Corrupt Practices Act has been adversely affecting American business. That section, as you may know, makes it unlawful to pay a bribe to a foreign government official.

In your capacity as an SEC Commissioner, would you have any difficulties in enforcing that section and supporting investigations into possible violation of the Foreign Corrupt Practices Act?

Ms. THOMAS. The Foreign Corrupt Practices Act is the law of the land. As a Commissioner I would work hard to support it, as I would support any other law enacted by Congress.

The CHAIRMAN. Do you support the Enforcement Division's efforts to enhance corporate accountability?

Ms. THOMAS. Yes, I support the Division's provision, and I believe it has been one of the major reasons why the Commission has been such an outstanding Federal agency. I believe that it is important for the managers of American business to be accountable to their shareholders, especially when such managers often do not own any significant amount of stock in the companies they manage.

The CHAIRMAN. As I understand it, the SEC's Enforcement Division staff has not been increased in the past several years. Certainly it hasn't been increased to keep pace with the responsibilities it faces. In fact, several positions recently were transferred to other divisions.

Shouldn't the Commission's Enforcement staff and role be increased as more exemptions are granted from registration filing requirements?

Ms. THOMAS. Having not worked at the Commission before, I really would not want to make a judgment on how the resources of the Commission should be allocated.

The CHAIRMAN. Wouldn't it stand to reason that the decrease in the Enforcement Division's staff undercuts the agency's ability to handle the increased enforcement burden that followed deregulation?

Ms. THOMAS. I would not want to draw that conclusion. It could be that with the simplification of forms and deregulation in general, it may be possible to reallocate resources so that such a result would not necessarily follow. As I stated before I really cannot make a judgment at this time.

The CHAIRMAN. Let me pursue this a little bit further. In line with the prevailing deregulation climate, which I certainly favor,

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as do most other members of the committee, and most other Americans, for that matter, the SEC has been taking steps to increase exemptions from the registration requirements as well as to reduce the filing requirements.

Should the SEC go any further in relaxing its registration and filing requirements?

Ms. THOMAS. I believe at this point that there is a responsible program of deregulation that has been commenced, and that the SEC is monitoring that program and that it will review the results of its monitorization. I do not believe as a matter of principle, that a responsible program of deregulation would necessarily produce an increase in violations. In fact it may be just the other way around. Accordingly I would favor cautious continuation of such relaxation.

To the extent that the Enforcement Division is strong and its existence is widely known, I think deregulation, simplification, and integration are positive steps for the securities industry.

The CHAIRMAN. Just one more question. The problem is whether or not the relaxation of registration and filing requirements might reduce investor confidence. Do you think that's a danger?

Ms. THOMAS. I really do not think so. I am not at all sure that voluminous registration statements are even read much of the time, by investors, or that it is the proliferation of documents, that give the investors confidence in our securities markets today. I think the existence of the SEC, the existence of the Enforcement Division, the high profile of the SEC's maintenance of the integrity of the markets, are the reasons that the American investor has more confidence now than ever before.

The CHAIRMAN. Ms. Thomas, I have other questions for the record that we would like to have you answer in writing, if you would. [See p. 19.]

The CHAIRMAN. May I join my colleagues in congratulating you on your qualifications; and I want to congratulate President Carter for having made an outstanding nominee, one who has clearly the qualifications, the vigor, and independence of youth, which is mighty welcome.

Thank you very much.

Ms. THOMAS. Thank you very much, Senator Proxmire.

The CHAIRMAN. The committee will stand in recess for just a minute or two. I see Senator McGovern, the first witness, is here for our next hearing. We will recess.

[Whereupon, at 10 a.m., the hearing was adjourned.]

[Additional material received for the record follows:]

STATEMENT FOR COMPLETION BY PRESIDENTIAL NOMINEES

Name: Thomas (LAST) Barbara (FIRST) S. (OTHER)

Position to which nominated: Commissioner, Securities and Exchange Commission

Date of nomination: July 29, 1980

Date of birth: 28 (DAY) 12 (MONTH) 46 (YEAR)

Place of birth: New York City, New York

Marital status: Married

Full name of spouse: Allen Lloyd Thomas

Name and ages of children: None

Education:

Institution	Dates attended	Degrees received	Dates of degrees
New York University Law School	9/66 - 6/69	J.D.	June 1969
University of Pennsylvania	9/64 - 5/66	B.A.	May, 1966
Temple University	9/63 - 9/64	--	--
Great Neck North Senior High School	9/61 - 6/63	H.S.	(Received June 1964)
Great Neck North Junior High School	9/59 - 6/61	--	--

Honors and awards: List below all scholarships, fellowships, honorary degrees, military medals, honorary society memberships, and any other special recognitions for outstanding service or achievement.

Order of the Coif

John Norton Pomeroy Scholar

Editor, New York University Law Review

Dean's List -- all semesters

American Jurisprudence Prizes for Excellence in 15 subjects

Memberships: List below all memberships and offices held in professional, fraternal, business, scholarly, civic, charitable and other organizations.

Organization	Office held (if any)	Dates
Bar Association of the City of New York	Chairman, Corporation Law Committee	From 1979 - Present
American Bar Association	—	1979 - Present
NYU Law Review Alumni Association	Member of Board of Governors	1979 - Present
University of Pennsylvania Alumni Council on Admissions	--	1978 - Present
Sales Executives Club of New York, Inc.	--	1979 to Present
New York State Bar Association	--	1980 to Present

Employment record: List below all positions held since college, including the title or description of job, name of employment, location of work, and dates of inclusive employment.

Dates of Employment	Title or Description of Job	Name of Employer	Location of Work
4/73 - Present	Attorney	Kaye, Scholer, Fierman Hayes & Handler	425 Park Avenue New York, N. Y.
9/69 - 3/73	Attorney	Paul, Weiss, Rifkind, Wharton & Garrison	345 Park Avenue New York, N.Y.
6/68 - 9/68	Summer Associate	Chadbourne, Park, Whiteside & Wolff	30 Rockefeller Plaza (present) New York, N.Y. 25 Broadway (then) New York, N.Y.
7/67 - 8/67	Secretary	Laurie Leasing Co.	9320 Wilshire Blvd., Beverly Hills, CA.
6/66 - 8/66	Computer Programmer	The Equitable Life Assurance Society of the United States	1285 Avenue of the Americas, New York, N.Y.

Government experience: List any experience in or direct association with Federal, State, or local governments, including any advisory, consultative, honorary or other part-time service or positions.

None

Published writings: List the titles, publishers and dates of books, articles, reports or other published materials you have written.

Staff member and Editor of New York University Law Review

1967-1969.

Political affiliations and activities: List all memberships and offices held in and services rendered to all political parties or election committees during the last 10 years.

Registered Democrat

Political contributions: Itemize all political contributions of $500 or more to any individual, campaign organization, political party, political action committee or similar entity during the last eight years and identify the specific amounts, dates, and names of the recipients.

None

Qualifications: State fully your qualifications to serve in the position to which you have been named. (attach sheet)

See attached sheet

Future employment relationships:

1. Indicate whether you will sever all connections with your present employer, business firm, association or organization if you are confirmed by the Senate.

Yes

2. As far as can be foreseen, state whether you have any plans after completing government service to resume employment, affiliation or practice with your previous employer, business firm, association or organization.

None

3. Has anybody made you a commitment to a job after you leave government?

No

4. Do you expect to serve the full term for which you have been appointed?

Yes

Qualifications

During the past eleven years, I have engaged in a general securities law and corporate practice. My work has included registration of debt and equity securities under the Securities Act of 1933, registration and reporting under the Securities Exchange Act of 1934, acquisitions and mergers of public and private companies, private placement debt and equity financing, and negotiations and drafting of numerous other corporate documents.

I have also served as a member of the Corporation Law Committee of the Association of the Bar of the City of New York. In September of 1979 I was appointed as Chairman of the Corporation Law Committee for a three-year term. In addition, I am a member of the Committee on Federal Regulation of Securities of the American Bar Association, and a member of the Securities Regulation Committee of the New York State Bar Association. I have also participated in panels and training discussions on the Federal Securities Law at my law firm.

Potential conflicts of interest:

1. Describe any financial arrangements or deferred compensation agreements or other continuing dealings with business associates, clients or customers who will be affected by policies which you will influence in the position to which you have been nominated.

See attachment

2. List any investments, obligations, liabilities, or other relationships which might involve potential conflicts of interest with the position to which you have been nominated.

None

3. Describe any business relationship, dealing or financial transaction (other than tax-paying) which you have had during the last 10 years with the Federal Government, whether for yourself, on behalf of a client, or acting as an agent, that might in any way constitute or result in a possible conflict of interest with the position to which you have been nominated.

As a lawyer in private practice, I have prepared or assisted in preparing documents for clients which have been filed with the Securities and Exchange Commission.

p.5, question 1

None. Prior to taking office as a Commissioner of the Securities and Exchange Commission I intend to resign as a partner of my law firm, Kaye, Scholer, Fierman, Hays & Handler, and I will sever all connections with such firm. However, I currently participate in the Kaye, Scholer, Fierman, Hays & Handler Retirement Plan and pursuant to such Plan, if I resign from the firm in 1980, the Plan would pay me, as a lump sum, the vested portion of my account as of December 31, 1980. In addition, because I am a partner, the unvested portion of my account will be paid to me at the same time. It is currently estimated that as of December 31, 1980 the total balance in my account (vested and unvested) will be $24,248, which will be 40% vested at that time. The entire amount would be paid in February 1981; thereafter, I will have no further connection with the firm of any kind.

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4. List any lobbying activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any legislation at the national level of government or affecting the administration and execution of national law or public policy.

None

5. Explain how you will resolve any potential conflict of interest that may be disclosed by your responses to the above items.

See attachment

Civil, criminal and investigatory actions:

1. Give the full details of any civil or criminal proceeding in which you were a defendant or any inquiry or investigation by a Federal, State, or local agency in which you were the subject of the inquiry or investigation.

None

2. Give the full details of any proceeding, inquiry or investigation by any professional association including any bar association in which you were the subject of the proceeding, inquiry or investigation.

None

Resolution of Conflicts of Interest

As noted above, I will resign as a partner of Kaye, Scholer, Fierman, Hays & Handler. In addition, as a Commissioner, I intend to disqualify and recuse myself from matters before the Commission in the nature of a request on behalf of a specific party for an exemption from a rule or statute of general applicability, or matters involving the institution of enforcement proceedings, under the following circumstances:

(a) where Kaye, Scholer, Fierman, Hays & Handler represents any party, or

(b) where I had any connection or gained significant knowledge while I was at Kaye, Scholer, Fierman, Hays & Handler, or

(c) where Paul, Weiss, Rifkind, Wharton & Garrison (in which my husband, Allen L. Thomas, is a partner) represents any party.

In addition, I intend to disqualify and recuse myself, on a case-by-case basis, with respect to any matter, where, in order to avoid the possible appearance of impropriety, it appears desirable to me to disqualify myself, despite the lack of any actual conflict of interest. In general, it is not my intention to recuse myself from general policy consideration on rule-making proceedings.

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF THE
GENERAL COUNSEL

CERTIFICATION CONCERNING THE FINANCIAL HOLDINGS
OF BARBARA S. THOMAS, NOMINEE FOR MEMBER OF THE
UNITED STATES SECURITIES AND EXCHANGE COMMISSION

I hereby certify that I have examined statements of the holdings of Barbara S. Thomas and her husband, Allen L. Thomas, as submitted by her to the President of the United States and to the United States Senate Committee on Banking, Housing and Urban Affairs.

I have reviewed those statements, together with underlying documentation furnished to me by Mrs. Thomas, pursuant to the requirements of Rule 5 of the Securities and Exchange Commission's Conduct Regulation, 17 CFR 200.735-5, and I certify that I found nothing in said statements which does not fully comply with the requirements of that Rule.

I further certify that my examination was also conducted to take into account the requirements of the Canons of Ethics for Members of the Securities and Exchange Commission, 17 CFR 200.50, et seq., and particularly Section 60 relating to possible disqualification in particular matters, and the requirements of Executive Order No. 11222, as amended (3 CFR, Jan. 1973, Rev., Chapter IV, pages 160ff), and particularly Part IV thereof relating to Presidential appointees, and I found nothing in said statements which does not fully comply with the requirements of the Canons and Executive Order.

Paul Gonson

PAUL GONSON
Solicitor
Securities and Exchange Commission
Washington, D.C. 20549
(202) 272-2471

Dated: July 30, 1980

August 19, 1980

Mr. Bruce Freed
Senate Committee on Banking,
Housing and Urban Affairs
5300 Dirksen Senate Office
Building
Washington, D. C. 20150

Dear Bruce:

As you requested, I am enclosing written answers to the questions which you provided me after my confirmation hearing this morning. If you require any further information, please do not hesitate to call me.

I appreciate the courtesies extended to me by you and the Members and staff of the Committee. I hope that we will have an opportunity to work together in the future.

With best wishes.

Sincerely,

Barbara

Barbara S. Thomas

Enclosure

Q: Could you tell the Committee what relationship you feel that the Commission should have with the self-regulatory organizations and what the Commission should do to make the self-regulatory scheme as effective as possible.

A: The genius of the Exchange Act was to create a system of regulation under which the securities industry regulates itself in the first instance. The purpose of this system is to permit the self-regulating organizations to utilize their own expertise in the regulation of the securities markets. It is the Commission's function to oversee and supervise their regulatory activity. The securities laws require the Securities and Exchange Commission to review, alter or abrogate all rules of the self-regulatory organizations and give the Securities and Exchange Commission the power to alter or abrogate such rules.

I believe that the Securities and Exchange Commission should give the self-regulatory organizations substantial autonomy in their function as industry regulators, but should also maintain vigilant surveillance and oversight.

In order to make the self-regulatory scheme as effective as possible, the Securities and Exchange Commission and the self-regulatory organizations should continue to expand their communication and exchange ideas on policies and operation on a frequent basis so that the ideal of a partnership in regulation can be fulfilled.

is currently pending before the Commission which raises the precise issue of the Commission's authority in this area. Because the Administrative Procedures Act would permit me to consider this important question, I do not believe that it will be appropriate for me to comment any further on this matter at this time.

Q: Are you committed to continuing the traditional Commission policy of vigorously disciplining lawyers, accountants and other professionals who violate the securities laws and SEC rules?

Are you committed to applying Rule 2(e) against lawyers and accounting firms?

Should Rule 2(e) be included in the American Law Institute's proposed Federal Securities Code.

A: I understand that the Commission's professional disciplinary proceedings are intended to protect the integrity of the Commission's processes from unlawful or unethical conduct that would be detrimental to the public interest and inimical to the purposes and policies of the federal securities laws. Touche Ross & Co. v. Securities and Exchange Commission, 609 F.2d 570 (2d Cir. 1979). It is clear, given the highly specialized nature of the securities industry and the paramount interests served by the statutory scheme of public disclosure, that professionals appearing or practicing before the Commission play a crucial role in ensuring that the policies underlying the statutory scheme are effected.

I have not conducted an independent analysis of Rule 2(e). I am informed that an administrative proceeding

Q: What do you consider to be the most important achievements of the SEC enforcement program?
What problems do you see with the enforcement program?

A: The Enforcement Division has done an extremely effective job over the years in maintaining the integrity of the the securities markets by rooting out and prosecuting fraudulent conduct. Its very existence and reputation for effectiveness has served as a deterrent to persons who might otherwise be tempted to violate the law. By maintaining the integrity of our capital markets and the integrity of our broker-dealer community, the Enforcement Division has helped to give the public confidence to invest, and thus, to stimulate the formation of capital.

Occasionally, some issuers have felt that an undue prosecutorial attitude has been taken in connection with preliminary investigations and that some personnel may be overzealous. I believe that the maintenance of the appearance of fairness is an important aspect of the Commission's work and that the Commission should create a climate in which honest businessmen appreciate and respect rather than fear the Enforcement Division. I believe that, historically, the Commission has been successful in creating the appropriate climate, however, neither the Commission nor any other government agency should refrain from self-examination.

66-854 O - 80 - 4

August 22, 1980

The Honorable Jake Garn
Senate Committee on Banking,
Housing and Urban Affairs
United States Senate
Washington, D. C. 20510

Dear Senator Garn:

As you requested, I enclose written answers to the questions set forth in your letter to me dated August 20, 1980.

I appreciate the courtesies extended to me by you and your staff and the members of the Committee and I hope that we will have an opportunity to work together in the near future.

With best wishes.

Sincerely,

Barbara S. Thomas

Enclosure

Q. 1. a. We discussed briefly at your hearing recent inititaives taken by the Commission to reduce the regulatory burdens on small businesses seeking to raise capital through the sale of securities. In your law practice have you had occasion to use, or to advise clients to take advantage of, these initiatives? If so, have you found that they have made it easier and/or more economical for small issuers to comply with the law?

b. As a general matter, do you believe it is appropriate for the SEC or the Congress to focus such relief on "small" businesses or "small offerings" or in the alternative, should initiatives designed primarily to benefit smaller issuers be applicable to all businesses, irrespective of size?

A. 1. a. In my practice I have not as yet had occasion to use, or to advise clients to take advantage of, the recent initiatives taken by the Commission to reduce the regulatory burdens on small businesses seeking to raise capital through the sale of securities. It has, however, been my impression from discussions with other members of my firm who have had occasion to utilize Form S-18 and Rule 242 that these innovations have been successful in reducing the amount of time, expense and effort necessary to be expended by small business in raising of capital.

A. 1. b. As a general matter, I believe it is appropriate for the Commission to attempt to facilitate small business capital formation. I believe that the burden of reporting weighs more heavily on small rather than large companies, and that reduction of reporting requirements for these companies is consistent with the purposes of Federal securities laws. I do, however, also believe that the registration and reporting requirements under the securities laws should be simplified with respect to all businesses, without regard to size, to the extent that such simplification will continue to provide full disclosure and to promote investor confidence. In this regard, I recognize that the Commission has adopted Form S-16 that allows certain large issuers to incorporate by reference periodic filings into their registration statements. Other integration initiatives have been proposed to simplify registration procedures for moderate-sized as well as for large issuers. I also endorse the Commission's efforts to encourage issuers and their counsel to prepare shorter, more comprehensible disclosure statements so the reader is not flooded with minute detail, is encouraged to read the complete document, and is able to understand its contents.

Q. 2. There is a continuing controversy, which may ultimately result in legislative or regulatory action, concerning the roles of the SEC, the Commodity Futures Trading Commission and other federal agencies in regulating futures markets, particularly those involving "financial futures" such as contracts involving futures on federal government securities and proposed contracts on stock index futures.

Have you taken positions, on behalf of clients or otherwise, with respect to this issue?

What role, if any, do you believe that the SEC should play in the regulation of existing futures markets? Should there be any different or greater role with respect to new futures contracts, such as the proposed contracts on stock market indices?

A. 2. I have not taken positions on behalf of my clients or otherwise with respect to the role of the Securities and Exchange Commission, the Commodity Futures Trading Commission and other federal agencies in regulating futures markets. I am currently aware, however, of the existence of a continuing study by the Securities and Exchange Commission, the Federal Reserve Board, the Department of the Treasury and the CFTC concerning regulation of the financial futures markets. As recent events suggest, there may be interrelationships among

the different types of markets for financial instruments, and the Commission, as well as other regulatory agencies, should consider whether it would be appropriate to design measures to deal with these interrelationships. In general, however, I believe that the issues raised by this question involve areas with respect to which Congress should make the final policy judgments, after receiving and analyzing the reports and recommendations from the various regulatory agencies and affected private interests.

Q. 3. As you know, there are many pending proposals to make federal agencies more responsive and to reduce unnecessary or outmoded regulations. These include sunset provisions, cost-benefit analyses of new regulations, different regulatory treatment of small business, and many other ideas.

a. What experience, if any, have you had in commenting on, or otherwise becoming involved in, rulemaking proceedings of the Securities and Exchange Commission?

b. What observations, if any, do you have about the Commission's responsiveness to comments submitted in rulemaking proceedings?

c. Do you believe that the Commission's rules and regulations should be subjected to a formal process of re-evaluation, through a mechanism such as a "sunset" provision?

A. 3. a. My practice has not involved me in the rulemaking proceedings of the Securities and Exchange Commission. As Chairman of the Committee on Corporation Law of the Association of the Bar of the City of New York, I did, however, participate in the preparation of a letter, dated November 29, 1979, commenting unfavorably on the Supplemental Petition of the Institute for Public Representation, a copy of which is enclosed herewith.

b. In the rulemaking petition proceeding noted above, it appeared to my Committee colleagues and me that our Committee's comment letter, together with the comments of other individuals and groups, were carefully considered by the Commission and that the Commission ultimately determined not to proceed with the rulemaking procedure at least in part in response to those comments. Similarly, it is my understanding that there were a large number of negative comments submitted by private commentators in response to the Commission's proposed rules under the internal controls provision of the Foreign Corrupt Practices Act. After reviewing such comments, the Commission determined to withdraw the proposed rules and, instead, determined to rely, for the next three years, on private initiatives. In general, I believe that it is important for the Commission to consider carefully comments on all proposed rules received from private lawyers, businessmen, and investors because they bring a different and important perspective to the rule-making process. I would, if confirmed, be committed to a careful consideration of all significant comments submitted in response to Commission rule proposals.

c. I believe that the Commission should use all appropriate analytic techniques in evaluating proposed rules. I believe, in general, that informed cost-benefit analyses

can have significant utility in such an evaluation process, but that there are important factors in rule-making proceedings that may not be amenable to such quantitative analyses. I cannot at this time, however, make a fully informed and considered judgment with respect to whether such a procedure should be required prior to the adoption of new rules. Should the Congress mandate such a procedure, I would urge the Commission to comply fully with the new requirements.

d. As a citizen, I believe that it is very important for Congress to conduct careful oversight programs of federal agencies. I am somewhat concerned, however, that some sunset provisions could create a situation in which businessmen would not be able to rely on the continued existence of orderly, consistent regulation. Orderly, consistent regulation such as the Securities and Exchange Commission's regulation of the disclosure rules and market activities has historically created, and continues to create, confidence of investors in the public market and facilitates the private formation of capital. I do, however, as stated above, believe that it is essential for Congress to periodically re-evaluate the mandates of federal agencies and to revise them if necessary.

Q. 4. In recent years the SEC has become increasingly involved in oversight of accounting practices involving publicly-held companies, as well as in any non-audit relationships between such companies and their accountants. Some critics charge that the SEC's activities in this area are leading toward a system of federal regulation, superseding the traditional roles of the states in regulating accounting practices.

a. Have you had occasion to consider these issues in your law practice or otherwise?

b. What approach would you take in decision-making regarding the SEC's relationship to the accounting profession?

A. 4. a. I have not had occasion to consider these issues in my law practice.

b. It is my understanding that the Securities and Exchange Commission has relied to a large extent on the accounting profession in connection with the establishment of financial accounting standards through the Financial Accounting Standards Board (FASB) and the establishment of auditing standards through the American Institute of Certified Public Accountants (AICPA). It is my belief that the Securities and Exchange Commission should continue to encourage these self-regulatory organizations to regulate the accounting industry in the first instance. I do believe, however, that the activities of the FASB and

the AICPA as they relate to the financial statements and audits of publicly-held companies should be monitored carefully by the Commission and that the Commission should be prepared to take appropriate regulatory action if necessary.

Q. 5. a. Former Commissioner Roberta Karmel criticized the Commission's exercise of authority under Rule 2(e), which permits the Commission to disqualify attorneys who practice before it. Do you believe that there is a significant problem if an agency such as the SEC, which is sometimes involved in adversary proceedings with attorneys who contest SEC actions, also has the authority to discipline those attorneys?

b. The Commission recently proposed, and subsequently decided not to adopt, rules which would have governed the relationship between publicly-held corporations and their attorneys by, among other things, mandating reports by attorneys to the board of directors and annual certification by the corporation of actions taken in response to such reports.

Do you believe that the Commission's authority extends to regulation of the type contemplated by the proposed rule? Based on your own background, do you believe that there is a conflict between the traditional role of the states in regulating the conduct of attorneys and the Commission's approach to the role of attorneys representing clients involved in securities transactions?

A. 5. a. I understand that the Commission's professional disciplinary proceedings are intended to protect the integrity of the Commission's processes from unlawful or unethical

conduct that would be detrimental to the public interest and inimical to the purposes and policies of the federal securities laws. Touche Ross & Co. v. Securities and Exchange Commission, 609 F.2d 570 (2d Cir. 1979). It is clear, given the highly-specialized nature of the securities industry and the paramount interests served by the statutory scheme of public disclosure, that professionals appearing or practicing before the Commission play a crucial role in ensuring that the policies underlying the statutory scheme are effected. On the other hand, based on my 11 years of experience in private practice, I believe that a lawyer needs to feel free to represent vigorously the interests of his clients without fear of retribution.

I have not conducted an independent analysis of Rule 2(e). I am informed that an administrative proceeding is currently pending before the Commission which raises the precise issue of the Commission's authority in this area. Because the Administrative Procedures Act would permit me to consider this important question, I do not believe that it will be appropriate for me to comment any further on this matter at this time.

b. As I stated in response to question 3, I participated in the preparation of a comment letter on this issue on behalf of the Association of the Bar of the City of New

York, a copy of which is enclosed herewith. That letter adequately reflects my current views, as a private practitioner, on this matter.

Q. 6. Many businessmen believe that the Foreign Corrupt Practices Act has interefered with the ability of U.S. firms to compete in export markets, not because of any desire to engage in bribery but because of the uncertainty created by the Act with respect to conduct which is accepted in some foreign countries.

a. Have you had any experience practicing under the Act?

b. What steps, if any, do you believe should be taken to clarify the meaning and intent of the Act?

A. 6. a. I have not had any personal experience practicing under the Foreign Corrupt Practices Act.

b. I believe that Congress should consider whether there are any existing ambiguities in the Act, and, if so, should clarify the obligations of businessmen thereunder so that conscientious people can comply therewith. I understand that the Commission itself has recently issued a release asking the public to comment on how best to implement certain provisions of the Act. I also understand that the General Accounting Office has done a survey on the impact of the Act on American business and that the report of the survey is expected in October of 1980. As a member of the Commission, I will carefully evaluate the comments of the public on its release, as well as the report of the General Accounting Office.

Q. 7. As you are not doubt aware, questions have been raised periodically about the standards of disclosure involved in securities offerings made by state and local governments. What role, if any, do you believe the SEC or other federal agencies should have in regulation or oversight of municipal securities?

A. 7. As you know, there is already a self-regulatory organization, the Municipal Securities Rulemaking Board ("MSRB") which regulates brokers and dealers of municipal securities. One of the functions of the Securities and Exchange Commission is to oversee and supervise the rulemaking activity of the MSRB and to enforce the MSRB rules with regard to broker-dealers. Although I am not an expert on the subject of municipal securities, I understand that there have been several bills introduced in the Congress during the last few years governing the standards of disclosure to be followed by states and local governments as issuers of securities. If confirmed, I will undertake to study this area in depth and to review all existing information gathered by the Commission and other sources with respect thereto prior to making any judgments in the area.

Q. 8. Prospectuses and other disclosure documents distributed to prospective investors seem to get longer and longer, and they often include extensive "boilerplate" which does not appear to make them more comprehensible to the average investor.

a. Based on your experience, do you believe that this is a problem which the Commission and securities professionals should address?

b. Do you believe that legal, accounting and other fees associated with securities offerings are likely to continue to increase substantially? If so, are there steps which the Commission or the private sector could take to reduce the costs associated with securities offerings?

A. 8. a. I believe that adequate disclosure is necessary to maintain the integrity of the capital markets and to continue to promote investor confidence. I do, however, agree that in recent years disclosure documents have proliferated, become more complex, and include information which may not be helpful to the average investor. Accordingly, I believe that the Commission should be, and indeed currently is, addressing this problem, in part by encouraging simplification of presentation. Furthermore, I support the move toward integration and the elimination of duplicative filings, and I believe that the promulgation of Forms S-16, S-18 and Rule 242 will have a

beneficial effect on the securities industry. I think it is necessary to recognize that different classes of issuers and different types of transactions require different levels of disclosure. I recognize that there is a tension between the level of information necessary to inform the securities analysts and other experts, and that necessary to inform and not confuse the average investor. I support continuing study by the Commission of ways to resolve this tension in a manner satisfactory to both types of users of the capital markets.

b. To the extent that disclosure documents and other Securities and Exchange Commission filings become more numerous, longer and more complex, it seems likely that professional fees will continue to increase. However, as the Securities and Exchange Commission moves toward a more simplified and integrated disclosure system, it seems reasonable to assume that the costs associated with securities offerings may be reduced.

Q. 9. A number of proposals have been advanced concerning the general subject of "corporate accountability" ranging from changes to be derived purely from initiation of the private sector to federal chartering of large corporations; many of these proposals would alter significantly the traditional deference to state law with regard to the relationships between corporations and their shareholders.

a. What are your general views concerning the role of the SEC and of the federal government as a whole with respect to "corporate accountability" and "corporate governance?"

b. Do you agree that, since the enactment of the basic federal securities laws, state laws -- particularly state securities and corporations laws -- have generally expanded the rights of shareholers and the responsibilities of corporate managers and directors? If so, do you believe that federal involvement in issues of "corporate governance" may be needed less now that it may have been in the past?

A. 9. a. Although it is necessary to insure that corporate managers fulfill their fiduciary responsibility to shareholders of corporations, I do believe it is important to assess continually the proper role of the federal government when entering the boardroom. The Commission has held

hearings and is preparing a corporate governance report reviewing all of its corporate governance initiatives thus far, and I will want to review it carefully.

b. I believe that the federal securities laws and the state securities laws should compliment each other, and that, in general, it is the states that should have the primary responsibility for the supervision of the governance of corporations incorporated therein. To the extent that both federal and state regulation is appropriate with respect to specific issues, the federal government should attempt to facilitate the coordination of all applicable requirements to eliminate unnecessary duplication. I also believe that it is necessary for representatives of the two types of governing bodies to work together so that there is no danger that compliance with one set of rules will risk violation of the other set.

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November 29, 1979

Mr. George A. Fitzsimmons, Secretary
Securities and Exchange Commission
500 North Capitol Street
Washington, D. C. 20549

Re: File No. 4-210; Release No. 34-16045

Dear Sir:

This letter, prepared jointly by the Committee on Securities Regulation and the Committee on Corporation Law of The Association of the Bar of the City of New York, responds to the Commission's request for comments on the Supplemental Petition ("Petition") of the Institute for Public Representation ("Institute") proposing rulemaking with respect to the relationships among companies required to file reports pursuant to the Securities Exchange Act of 1934 (the "1934 Act") and their counsel.

We are greatly disturbed that the Commission submitted the Petition for comment without itself determining that it has authority to adopt the rules proposed in the Petition, that such rules are necessary or appropriate as a matter of policy and that such rules are appropriately drafted and would be workable. We submit that it is not in the public interest for the Commission to impose on interested persons the burden of commenting on a petition when the Commission has not reached at least a tentative determination that the proposals contained in the petition have even the possibility of being meritorious.

We think it apparent that the rules proposed in the Petition are beyond the Commission's authority to promulgate; would be harmful to reporting companies and the investing public; would be detrimental to the Commission's pursuit of its regulatory efforts and goals; and are badly drafted and would prove to be unworkable. Even if these serious defects could be cured (which we doubt), we believe that this is the wrong time and the wrong way to affect the relationships between reporting companies and their counsel.

THE COMMISSION HAS NO AUTHORITY TO DICTATE THE RELATIONSHIPS BETWEEN REPORTING COMPANIES AND THEIR COUNSEL IN THE MANNER PROPOSED BY THE PETITION AND UNDER THE GUISE OF DISCLOSURE

We discuss the question of the Commission's authority to act on the Petition by reference to the 1934 Act, which is the only statute discussed in the petition and in the Commission release. We do not believe there is any other statute which would give the Commission authority to adopt the rules proposed in the Petition.

Nothing in the 1934 Act gives the Commission authority to regulate the relationships between lawyers and the corporations for which they act. Indeed, the 1934 Act does not even mention lawyers, and nothing in the statute or its legislative history authorizes the Commission to regulate the practice of law.

The regulation of the legal profession historically has been left to the states. Congress has expressly deferred to the states in this area,* and the Supreme Court

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* See Section 500(b) of the Administrative Procedure Act, and its legislative history, particularly H.R. Rep. No. 1141, 89th Cong., 1st Sess., 1965 U.S. Code Cong. & Admin. News 4170, 4173.

has several times recently stated that federal securities legislation, particularly the 1934 Act, does not supersede substantive state law.*

The extent to which the Commission may affect corporate governance has been discussed frequently in recent years in connection with proposals for proxy statement and other disclosure of the existence and functioning of audit and other committees, the independence of boards of directors, and similar matters. The Commission has recognized the sensitivity of the question and has appeared to concede that its powers with respect to substantive regulation of corporate governance are strictly limited. For example, the Commission has referred to the possibility that it might seek legislation authorizing it to act in the corporate governance area.**

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* See Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976); Santa Fe Industries, Inc., v. Green, 430 U.S. 462 (1977); and Burks v. Lasker, ____ U.S. ____, 99 Sup. Ct. 1831 (1979).

** See Securities Exchange Act Releases Nos. 13482 (April 28, 1977) and 14970 (July 18, 1978).

The Petition completely disregards these limitations on the Commission's authority. It is based upon the false assumption that the Commission is empowered to mandate substantive action by requiring disclosure that such substantive action has been taken. For example, the Petition proposes to require a corporation to disclose that it has given specified instructions to counsel, that its counsel has complied with those instructions, that its board of directors has taken certain action, that certain information has been communicated to its auditors and that it has written agreements with counsel. Of course, a corporation could not comply with these so-called disclosure requirements unless the substantive actions specified had been taken. Clearly, the Commission has no authority to engage in this type of substantive regulation.

THE RULES PROPOSED IN THE PETITION WOULD BE HARMFUL TO REPORTING COMPANIES AND THE INVESTING PUBLIC AND DETRIMENTAL TO THE COMMISSION'S PURSUIT OF ITS REGULATORY EFFORTS AND GOALS

As the Petition recognizes, attorneys in our system have a critical role in the administration of justice and a central impact on efficient administrative regulation

and the public interest. The availability of effective and competent legal advice to the private sector is widely regarded as a vital to achieving adherence to the rule of law in our society. The attorney-client privilege has been developed in recognition of the responsibilities placed on attorneys in our system.

To function effectively, corporate counsel needs full access to information from all of the actors within the corporation. Counsel must be in a position to ascertain the relevant facts bearing on a particular legal problem in a spirit of cooperation and mutual understanding without inspiring fear of opprobrium or personal liability on the part of individual management personnel. It is essential for counsel investigating a legal problem to be able to engage in a wide ranging inquiry that may touch on a number of matters the relevance of which is not immediately apparent. To insure effective legal representation, corporations must be encouraged to seek legal advice even on matters where the need for such advice is not immediately apparent to those requesting it. Counsel are often asked to follow developments without any certainty that they will

result in events of material legal significance. Open and candid interchanges between the management of the corporation and its legal advisers are essential for the smooth functioning of this process.

A central feature of the proposals submitted by the Institute is the proposed requirement that each corporation disclose, in a "certificate" contained in its Form 10-K and annual report to shareholders, that it has instructed all attorneys for the corporation -- whether inside or outside counsel, or general or special counsel, and regardless of the significance of the matters on which they are representing the corporation -- to report directly to the Board of Directors or a committee thereof regarding any corporate activities discovered through "reasonable diligence" during the course of their representation which, in their opinion, "violate or probably violate" any law, where such violations or probable violations could result in material financial liability, call into question the quality and integrity of management or are a part of a pattern or practice of recurring activity.

In general, the question of what matters should be reported to the Board of Directors traditionally has been a matter for determination by the Board itself and by management. The problem of when and under what circumstances a lawyer may have an independent obligation to report serious violations of law to the Board of Directors, if management persists in ignoring legal advice, is a complicated one which cannot be dealt with properly in the simplistic fashion proposed by the Petition.

The proposed requirement that all matters of the kind referred to in the Petition be reported to the Board of Directors would reduce the effectiveness of corporate counsel, to the detriment of reporting companies and their shareholders. There would be much greater reluctance on the part of management to volunteer information to counsel concerning all facts which counsel might deem relevant to give proper advice in the circumstances. In addition, lawyers would tend to be involved less often and at a later stage than at present. Lawyers for reporting companies would feel impelled to undertake far more extensive investigations than might be warranted under the circum-

stances in order to avoid a possible charge that they failed to exercise "reasonable diligence" to discover matters which, even though not material, might be viewed, with hindsight, as involving the quality and integrity of management or patterns or practices of recurring activity. The proposed rules would place lawyers and clients in a position where there is an inherent possibility of conflict between the interest of the attorney and the interest of the client, thereby impeding the ability of the lawyer to give fully informed and disinterested advice to the client.

Furthermore, the Institute's proposals would require reporting companies in many cases to waive the privlege against disclosure of confidential communications with counsel. It is not clear whether the Petition contemplates that a reporting company's "certificate" in its Form 10-K and annual report to shareholders would only certify that the specified procedures had been followed, or whether the Form 10-K and annual report would have to disclose material facts concerning corporate activities which "violate or probably violate" the law. The Petition discussion concerning the importance of disclosing contingent liabili-

ties may suggest that the latter is intended. In any event, the proposed rules would require disclosure of such facts to the independent auditors. In addition, the proposed rules would require Form 8-K disclosure of the circumstances surrounding any resignation or dismissal of counsel -- a requirement which presumably would require disclosure of any disagreements concerning violations or probable violations of law. The potential destruction of the client's privilege, through disclosure to the outside auditors and possibly the public, necessarily would further restrict the willingness of corporate officers to communicate with counsel and, accordingly, would further impair the ability of corporations to obtain and utilize informed legal advice and effective legal representation.

The question of how to balance the interests of investors and the public in obtaining material information with their interests in encouraging legal review of corporate actions through the confidentiality of communications with counsel was discussed extensively and resolved in connection with lawyers' responses to auditors' inquiries on litigation and other contingent liabilities. Several

years of debate on the subject led to co-ordinated statements by the American Institute of Certified Public Accountants and the American Bar Association.* We are not aware, and the Institute has not demonstrated, that there has been any break-down in the procedures set forth in these carefully constructed statements. Nevertheless, the Institute apparently believes that it is necessary to destroy the values of confidentiality which these statements were designed to preserve.

Of fundamental importance from the standpoint of the Commission, we believe that the rules proposed in the Petition would be detrimental to the Commission in enforcing the securities laws and achieving its regulatory goals. The Commission has limited resources. It has relied historically to a great extent on the cooperation of the securities bar. This cooperation has produced a high

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* ABA Statement of Policy Regarding Lawyers Responses to Auditors' Requests for Information, 31 Business Lawyer 1709 (April 1976); Same, Second Report of the Committee on Audit Inquiry Responses, 30 Business Lawyer 177 (November 1975); AICPA Statement on Auditing Standards No. 12, Inquiry of a Client's Lawyers Concerning Litigation Claims and Assessments (January 1976).

degree of understanding of, and voluntary compliance with, the federal securities laws. The publication of the Proposal is viewed as signalling a possible dramatic change from cooperation to confrontation. In addition, as previously noted, the proposed rules would impair the ability of counsel for reporting companies to give informed advice concerning compliance with the federal securities laws and other laws. Accordingly, the Petition is seriously counterproductive of the Commission's efforts and should be rejected promptly.

THE TIME IS INOPPORTUNE AND THE CIRCUMSTANCES WRONG FOR THE CONSIDERATION OF SO BASIC A PROPOSAL TO RESTRUCTURE THE RELATIONSHIPS BETWEEN REPORTING COMPANIES AND THEIR COUNSEL

The same considerations which impelled the Commission to conclude that it was not timely to consider the Institute's petition of May 25, 1978, should have impelled the Commission to determine that it was not timely to consider the Petition of November 22, 1978, submitted for comment.*. The Committee on Securities Regulation has

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* We do not, by referring to the Commission's reasons set forth in its letter of July 25, 1979 (Appendix A to the Release), mean to acquiesce in the Commission's remarks about the appropriateness of proceeding in the area of the obligations of counsel by disciplinary and enforcement proceedings instead of by making its views known in advance through rulemaking.

filed an amicus brief in the Commission's pending proceedings in the matter of William R. Carter and Charles J. Johnson, Jr., Administrative Proceedings File No. 3-5464, and we are hopeful that an authoritative decision in that case may shed some light on the Commission's powers over lawyers and their relationships to the corporations for whom they act, and on the question of what matters constitute practice before the Commission and what matters do not constitute such practice. Other pending proceedings may produce rulings as to the Commission's powers in these respects. In addition, when the consensus of the bar is reached in the current procedures of the American Bar Association's Committee on the Evaluation of Professional Standards, it will shed light on the obligations of counsel. Finally, the Staff of the Commission is preparing a report on corporate governance which may deal with some of these questions.

It is most inopportune for the Commission, before the Carter and Johnson case and other cases are resolved, before the American Bar Association Committee has completed its work and before the Staff has finished its

report, to proceed to rulemaking on the basis of so ill-conceived and so badly drafted a proposal as the Petition, which does not address itself meaningfully to the question of the Commission's authority, the issue of the client's privilege against disclosure of confidential communication with counsel, the impact of the proposal on the relationship between lawyers and their clients, and other relevant matters.

THE PROPOSAL IS POORLY DRAFTED AND WOULD PROVE TO BE UNWORKABLE

Proposal 1 in the Petition would require "each attorney employed or retained by the corporation" to report to the Board of Directors (or an independent committee thereof) any corporate activities discovered by the lawyer "through reasonable diligence" which "violate or probably violate" any law, if such violation or probable violation "could" result in material financial liability, or calls into question the quality and integrity of management, or is "part of a pattern or practice of recurring activity."

There are many serious defects in Proposal 1. For example, the purpose and meaning of the "through reason-

able diligence" requirement are unclear. Thus, it is unclear how the proposal would apply if a lawyer failed to discover illegal conduct because of a lack of "reasonable diligence" or, conversely, happened to find out about illegal conduct solely through inadvertence. We assume that Proposal 1 is intended to impose an obligation upon lawyers to use "reasonable diligence", and we question the authority of the Commission to impose such an obligation. But what does "reasonble diligence" mean? Must a law firm, acting solely as special counsel for a corporate borrower on a bank loan agreement, use "reasonable diligence" to discover whether press releases or 1934 Act filings (or the absence thereof) violate the securities laws? Proposal 1 leaves these and many other questions unanswered.

Proposal 1 is far too broad. It would apply to "each attorney employed or retained by the corporation." For a large corporation, this would cover many lawyers, from a general counsel fully familiar with many of the corporation's legal affairs to a collection attorney employed solely to collect an account receivable. The Proposal would apply to a violation or probable violation of any law, including not only Federal, state and local laws in

the United States, but also foreign laws. It would apply to a series of minor violations which constituted a "pattern or practice of recurring activity", quite apart from any consideration of materiality or integrity of management. It would cover a "probable violation" which "could" result in material liability, quite apart from any consideration of whether other counsel (perhaps more skilled in the particular area of law) disagreed with a particular lawyer's assessment of the probability that the conduct violates the law and quite apart from any practical assessment of the actual exposure of the corporation. Thus, the Board of Directors could be presented with a large amount of information having no material significance to the corporation -- a result which would interfere with the Board's consideration of truly important matters.

Proposal 2 in the Petition would require a reporting company to file copies of "written agreements delineating the relationship between the corporation and its outside attorneys". Here again, the Petition is poorly drafted and overly broad. Proposal 2 assumes that a corporation should have a written agreement with each outside attorney -- an assumption for which no support is given.

The Proposal would cover all outside counsel, without regard to the amount or significance of the work performed by a particular lawyer. For example, it would seem to require the filing of contingent fee agreements on collection matters. Proposal 2 is completely vague as to the matters to be covered in such written agreements. Indeed, Proposal 2 simply states the agreements "may" cover matters which "might be of concern to stockholders and other investors". The examples provided in the Proposal dealing with the frequency of contacts with and obligations of counsel are not matters that can appropriately be covered by contractual language which, of necessity, must deal in generalities.

Proposal 3, which would require the filing of a Form 8-K describing the circumstances surrounding the dismissal or resignation of the corporation's general counsel or "any attorney retained in connection with matters pertaining to the laws administered or enforced by the Commission," suffers from similar defects. The Proposal gives no guidance as to what constitutes dismissal, e.g., if a corporation ceases to call on a law firm for further services in securities matters or reduces drastically the

law firm's work in that area and gradually begins to seek securities counsel elsewhere, does that constitute a "dismissal"? It does not set forth the kind of time schedule for the filing of the Form 8-K which would be permitted in order to give the corporation time to draft the required disclosure, to submit it to the resigning or dismissed attorney, and to obtain his comments. It would cover such insignificant matters as disputes over fees and the quality of the lawyer's work, as well as disputes concerning questionable corporate conduct.

The Petition is drafted so broadly that it would include non-U.S. issuers subject to Commission jurisdiction and non-U.S. lawyers for domestic and foreign issuers subject to Commission jurisdiction. The Petition appears to have ignored completely the possibility that the proposals would be in direct and serious conflict with laws and practices regulating the legal profession in other countries.

In short, the Petition is so ill-conceived, is so poorly drafted and would prove to be so unworkable that it does not merit serious consideration.

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For all of the above reasons, we respectfully urge the Commission promptly to reject the Petition.

Very truly yours,

Leonard M. Leiman,
Chairman of the Committee
on Securities Regulation

Barbara Singer Thomas,
Chairman of the Committee
on Corporation Law

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