



SECURITIES AND EXCHANGE COMMISSION

Washington, D. C. 20549

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FOR RELEASE: Friday, November 2, 1984

84-57

COMMENTARY ON THE PROPOSED REVISION OF THE
RESTATEMENT OF FOREIGN RELATIONS LAW
RELEASED BY SEC GENERAL COUNSEL

Daniel L. Goelzer, General Counsel of the Securities and Exchange Commission, today released comments on the proposed revision by the American Law Institute ("ALI") of the Restatement of the Foreign Relations Law of the United States. The ALI is revising certain sections of the Restatement; the General Counsel believes the proposed revisions would unduly constrain both the application of the United States securities laws in transnational activities and the Commission's ability to pursue violations of those laws. The Commission has expressed no view on this commentary.

Summary of the Views of the General Counsel

The revised Restatement would replace settled law with vagueness and uncertainty. It would abandon presently accepted judicial principles, which in large part would be codified by the Federal Securities Code that has already been approved by the ALI and endorsed by the Commission, and would substitute, in most instances, an amorphous and wide-ranging "reasonableness" analysis, which would spawn litigation and reduce certainty. In addition,

the reasonableness analysis of the revised Restatement would make it more difficult to apply United States law to transnational securities activities, even in circumstances where United States law would unquestionably be applicable now.

The revised Restatement's analysis would remove the predictability of current law because there are many interpretive difficulties involved in applying its non-exclusive reasonableness factors. In addition, the critical process of balancing the various factors would be left to ad hoc determination in each individual case. The results under such a system would necessarily depend on the decision-maker, and the application of United States law would be difficult, if not impossible, to predict. This would encourage litigation of jurisdictional issues that have been resolved under current law.

The revised Restatement contains a specific provision exempting "transactions * * * on a securities market in the United States" from the overall reasonableness inquiry, and directing application of United States law. That provision does not, however, solve the problems created by the more general jurisdictional provisions. The exemption apparently focuses on purchases and sales, and thus overlooks the importance of securities regulation in a variety of other contexts.

The revised Restatement would also change the existing approach to access by the Commission to information protected from production or disclosure by foreign law. It would require a

court order for production of such information, as opposed to current practice, which permits use of the rules of discovery or the mechanisms of administrative access to information. This would remove, without justification, the presumption of regularity which normally attaches to the administrative and judicial litigation processes, and would slow (or even halt) litigation where speed is of the essence. The revised Restatement could also deprive the Commission of authority to enforce routine summary regulatory actions -- such as suspensions of trading and suspensions of exemptions under Regulation A -- outside the United States.

Further Information

For further information or a copy of the full text of the General Counsel's comments, contact Douglas C. Michael at (202) 272-2070.

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