

confidential treatment of some types of information that we believe should not be made generally public.

We are of the view that there are important considerations why certain material in the Commission's files should not be subject to general public scrutiny, as where disclosure of the material would impair the advice and assistance we render to persons seeking to comply with the statutes we administer, where it would unfairly injure members of the public, or where it would interfere with free communication between Government officials with respect to the most efficacious manner of administering the law. Certain of these considerations are recognized in the legislative history of the Administrative Procedure Act, which points to the problem of publicity which might "reflect adversely upon any person, organization, product or commodity" prior to "actual and final adjudication" by an agency. (H. Rept. 1980, 79th Cong., 2d sess. (1946), p. 40.) The importance of these considerations may vary in different situations. Thus, information sought in a congressional investigation or pertinent to the determination of a lawsuit might properly be made available despite counteravailing considerations which would be sufficient to refuse to make the information available to casual inquirers.

We would emphasize that, as to a large part of the material in the Commission's files which is not made public, the primary reason for privacy is to protect the rights and interests of private persons having business before the Commission. The statutes administered by the Commission have an impact on a wide variety and great number of business transactions and arrangements; consequently, businessmen very often must determine the effect of these statutes upon proposed transactions and arrangements and the steps necessary to be taken in planning and executing them so that there will be no delays resulting from questions that might otherwise be raised as to full compliance with the securities law. To enable these matters to be resolved properly, full details of proposed transactions such as mergers, acquisitions, and financing plans are given to and discussed with the Commission's staff, often substantially in advance of the consummation of the transactions. Businessmen expect, and we believe have a right to expect, that their confidence in disclosing these matters will be respected; otherwise the administration of the Federal securities laws would be greatly complicated and the ability of American and international business organizations to plan and execute important transactions within time schedules required by economic circumstances would be impaired. These transactions may be of international importance and sometimes directly involve foreign governments. Without these informal discussions by which business problems are resolved in a businesslike way, administration of the securities laws would be greatly impaired and, indeed, it is doubtful that these laws could be effectively administered. The Commission has repeatedly been commended for evolving such informal procedures for advising persons seeking to comply with the law. Professor Loss has stated:<sup>3</sup> "This practice—which a task force of the second Hoover Commission reported as having been 'most effectively used' by the SEC<sup>4</sup>—is an essential and popular service with the bar and the securities industry. Thousands of such opinions are given each year."

Privacy is essential to this process. Businessmen should not be compelled to give premature publicity to proposed business transactions which they would otherwise keep strictly confidential for the protection of their business, simply because, as a practical matter, it is necessary that they consult the Commission in advance. Moreover, premature and unplanned disclosure of contemplated business transactions which are discussed with the Commission could affect the markets for the securities of the companies involved<sup>5</sup> and afford an opportunity to overreach the investing public to those persons who first gained access to the information.

Similarly it would be impossible as a practical matter for the Commission to enforce its proxy rules if it were unable to keep preliminary proxy material nonpublic. The Commission's proxy rules, which relates to corporate elections and corporate actions requiring the vote of security holders and which are applicable to all corporations listed on national securities exchanges as well as to numerous other companies, provide that material to be sent to stockholders

<sup>3</sup> Loss, "Securities Regulation" (1961), p. 1895.

<sup>4</sup> Commission on Organization of the Executive Branch of the Government, Task Force Report on Legal Services and Procedures (1955) 189.

<sup>5</sup> See Report of Special Study of the Securities Markets of the Securities and Exchange Commission, H. Doc. 95, pt. 3, 88th Cong., 1st sess. (1963), pp. 70-93.