

## SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933, Release No. 3411  
SECURITIES EXCHANGE ACT OF 1934, Release No. 4593  
INVESTMENT ADVISORS ACT OF 1940, Release No. 58

### OPINION OF THE GENERAL COUNSEL RELATING TO THE USE OF "HEDGE CLAUSES" BY BROKERS, DEALERS, INVESTMENT ADVISERS, AND OTHERS

April 10, 1951

#### TEXT:

The Securities and Exchange Commission released today the following opinion of its General Counsel, Roger S. Foster, relating to the use of "hedge clauses" by brokers, dealers, investment advisers, and others.

"My opinion has been requested concerning the legality of various types of 'hedge clauses' which are used in the literature of brokers, dealers, investment advisers and others. While the language of these hedge clauses varies considerably, in substance they state generally that the information furnished is obtained from sources believed to be reliable but that no assurance can be given as to its accuracy. Occasionally language is added to the effect that no liability is assumed with respect to such information.

"All the statutes administered by the Commission provide that any condition, stipulation or provision which binds any person to waive compliance with their requirements shall be void. Apart from these provisions, moreover, the courts have repeatedly held that a hedge clause or legend disclaiming liability has little, if any, legal effect as protection against civil liability where a person makes a representation which he knows, or in the exercise of reasonable care could have discovered, is false or misleading. See *Equitable Life Insurance Co. of Iowa v. Halsey, Stuart & Co.*, 312 U.S. 410 (1941); *People v. Federated Radio Corporation*, 244 N.Y. 33, 154 N.E. 655 (1926); *Tone v. Halsey, Stuart & Co.*, 286 Ill. App. 169, 3 N.E. 2d 142 (1936); *Continental Insurance Co. v. Equitable Trust Co.*, 127 Misc. 45, 215 N.Y.S. 281 (1926); *Wolfe v. A.E. Kusterer & Co.*, 269 Mich. 424, 257 N.W. 729. The question arises, therefore, whether the result, if not the purpose, of such a legend is to create in the mind of the investor a belief that he has given up legal rights and is foreclosed from a remedy which he might otherwise have either at common law or under the SEC statutes.

"In my opinion, the anti-fraud provisions of the SEC statutes are violated by the employment of any legend, hedge clause or other provision which is likely to lead an investor to believe that he has in any way waived any right of action he may have, assuming, of course, that the mails or other jurisdictional elements are involved. I refer to Section 17 (a) of the Securities Act of 1933, Section 10 (b) of the Securities Exchange Act of 1934 and Rule X-10B-5 thereunder, Section 15 (c) (1) of that Act and Rule X-1501-2 thereunder in the case of a broker or dealer effecting a transaction over the counter, and Section 206 of the Investment Advisers Act of 1940 in the case of a registered investment adviser.

"A legend in common use states in effect that the information is obtained from specified sources and is believed to be reliable but that its accuracy is not guaranteed. Assuming the truth of the representations as to the source of the information and the belief that it is reliable, it is my opinion that the mere use of this legend in connection with a communication supplying information is not objectionable. This does not mean, of course, that there would be any justification for representing to the investor, either when the information is supplied or thereafter, that the effect of the legend is to relieve the person using it from a liability under the above-mentioned statutory provisions and rules."