

January 29, 1943.

Dear Felix:

Re: No. 254, Chenery

Human experience has led the law to adopt as a principle a rule or regulation that a fiduciary may not deal in property put into his charge no matter what his purpose or intent may be. He may not profit. He must stand the loss. Human experience has taught mankind that to permit otherwise puts too great a strain on people's frailty.

In the S.E.C. Act Congress was dealing with reorganizations. It left the conclusion as to what conforms to the standard -- "fair and equitable"-- to the Commission. You say the Commission from its experience may fashion a new "general" rule of conduct. I say, it has done just that. It has given its reasons in analogy to equity and fiduciaryship, in the fact that profits were made, that stock was bought and plans devised after the purchase. Therefore it said that fiduciary reorganization managers may not deal in stock of companies being reorganized.

It is not a question of "ethical behavior." It is a finding that this behavior, whether heretofore within the morals of the market place or not, is forbidden because, looked at in the large, it is unfair and inequitable.

Every such decision has a principle behind it. Here it is the principle of non-dealing by reorganization managers with the stock of a reorganized company. A few such ad hoc decisions will result in a regulation -- that is the way regulations grow.

I do not think the Commission followed a rule of equity. It adapted the equity rule to a new situation and announced, as it was expected and authorized to do, a new principle.

It seems to me Black's opinion expresses my view and with deference to your ideas and appreciation of your comments, I do not see why we should require a prior formal regulation.

Doesn't our difference come to this: a regulation would be good; an ad hoc ruling is bad to you and good to me? Every decision must be an ad hoc ruling, as I see it. An application of the Commission's idea as to "fair and equitable." Such application should be guided by precedents and regulations but may depart from them. If it does not go too far (arbitrary, capricious and unreasonable), it should be upheld. This is the essence of administrative law.

Faithfully, even if perversely,

Mr. Justice Frankfurter.