Office of the Solicitor General
Washington, D. C.

November 1, 1962

Honorable William L. Cary
Chairman
Securities and Exchange Commission
Washington 25, D. C.

Re: Securities and Exchange Commission
<u>v. Capital Gains Research Bureau, Inc</u>.

Dear Bill:

I have now reviewed the opinions below and papers bearing upon your recommendation that the government seek certiorari in the above-entitled case, and yesterday had a long and interesting conference with members of the SEC staff. I have instructed my assistants to go ahead with the work of preparing a petition which I shall file, against my better judgment, if the Commission insists. I venture to suggest that the Commission itself should reconsider the issue carefully before it insists. The case was obviously a very disappointing and much publicized loss. The defeated lawyers are not always capable of detached judgment on the wisdom of seeking a Supreme Court view.

It seems highly significant that three of my assistants and I, myself, should each have come to the clear position that this is not a suitable case in which to file a petition for certiorari. There are often close cases in which we disagree upon the wisdom of filing a petition, but, here, each independently came to the same conclusion.

One of the major reasons for thinking that a petition for certiorari should not be filed is that the precise holding of the court of appeals is far from clear. The strongest argument for the Commission would seem to be (1) that the six or seven incidents in question show that the respondent put out its advice concerning a security, having it in mind that

if the market should rise or fall following the advice, the respondent would then sell--or in one case buy--the stock at a profit; (2) that a fiduciary has an obligation to disclose such an intent concerning the stock with respect to which he gives advice, and (3) that the failure to perform the duty of disclosure is a fraud or deceit. The majority of the court of appeals may have implicitly rejected this argument, but the opinion does not reject it explicitly. One can quote sentences bordering this proposition on either side, but I find none that can be said to deal with it explicitly.

This uncertainty is particularly important in dealing with an interlocutory appeal. There is nothing to prevent the Commission from going before the district judge and making the very arguments on the facts and law that I have just suggested. Perhaps the district judge would reject it; perhaps it would be rejected on appeal. Nevertheless, one would then have a clear-cut issue.

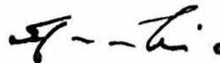
The second major reason for thinking that this is not an appropriate case for Supreme Court review is that there is no need for Supreme Court interpretation because the statute has been changed to give the Commission power to deal with this kind of practice. Prior to 1960 the Commission acknowledged that there was some doubt as to the exact scope of the fraud and deceit section. Some of the Commission's own positions--for example, that one need not disclose his position on a stock about which he gives advice except when he intends to buy or sell at a short-term profit--are not entirely clear to the unsophisticated. The 1960 amendment was plainly intended to enable the Commission to deal with practices that might theretofore have been arguably on the borderline, and there cannot be the slightest doubt of the Commission's ability to draw a rule covering the very evil revealed by this case. No doubt human fallibility would prevent drawing a set of rules that covered every conceivable breach of fiduciary duty, but one could accomplish a great deal by listing a number of unlawful practices and then ending with a catch-all; for the catch-all would be broader than the pre-1960 statutory language by virtue of the specific prohibitions indicating where the line was to be drawn. I may add that some of us believe that this would be a much fairer and sounder form of administrative regulation.

Third. The Commission would seem to have more to lose by taking the case to the Supreme Court than it has to gain. It is far from clear that certiorari would be granted and although I am inclined to think that the Commission would prevail on the merits, it would be unwise to assume that this was a foregone conclusion. The lower courts and the bar attribute considerable significance to the denials of certiorari, and an adverse decision at that stage would provide far more detrimental publicity and have a much more embarrassing influence on the Commission's other litigation than the decision of the court of appeals, unfortunate as it undoubtedly was. Furthermore, in the effort to show the importance of reviewing a decision on a problem with which the Commission has new and adequate statutory authority to deal, one is all too likely to make arguments about the implications of the case which will boomerang if certiorari is denied or it is affirmed on the merits. For example, the court of appeals' opinion goes rather far, perhaps all too far, in differentiating the statutory provision in question from the other legislation administered by the Commission. I gathered the impression that your staff would like to argue that the several statutes are so alike in this respect that the decision interpreting one will affect the administration of the others. If the Commission takes that view and certiorari is then denied, its predicament will be worse than before.

The embarrassing effect of the precedent could certainly be minimized by a strong statement, renewed prosecution of the case in the district court and the early issuance of a specific regulation.

These considerations convince me that a petition for certiorari should not be filed; however, there is a chance that it would be granted. Most of my objections go to the wisdom of a petition from the Commission's own point of view. Under such circumstances I should defer to your judgment when satisfied that the considerations have been taken into account.

Sincerely,



Archibald Cox
Solicitor General