



LET'S NOT CALL THE REGULATOR!

How many times have you heard someone suggest giving the regulator a call?

Legal issues arising in connection with statutes and regulations that are subject to a state or federal regulatory authority can and frequently do involve difficult interpretations. The statutes and regulations often contain ambiguities, lack of definitiveness and, all too frequently, apparently contradictory provisions. Sorting through this morass and applying rules of statutory construction is the job of an attorney. There is no substitute for legal training and experience in resolving these issues to give clients appropriate guidance.

Generally, regulators will not render authorized or reliable legal advice and almost never will they put it in writing. Frequently they will suggest that legal counsel be contacted. However, it is not unusual for persons in state and federal agencies to express an "opinion" on a legal question. And, unfortunately, these persons are generally not lawyers or the chief regulatory authority. That's where the problems develop.

Oral "opinions" expressed by persons in regulatory agencies are frequently: 1) only personal opinions, not backed by the regulatory authority, 2) based on an inaccurate understanding of the facts or issues, 3) politically biased, 4) consumer biased, 5) aimed at expanding the regulator's authority, 6) wrong from a legal analysis perspective, and 7) subject to change with the wind. Such opinions are not reliable legal advice and likely would carry no weight in court or with the next administration.

At best, there is probably no better than a 50% chance that the "opinion" is actually correct. If an opinion is obtained from a chief regulatory authority, it is only an enforcement position that is subject to change with a change in administration.

But, an even deeper issue for attorneys is that calling a regulator is not practicing law. Any staff member at a client's office can place a call. Practicing law requires the application of numerous legal principles to an entire body of statutory and regulatory materials and case law to reach a reasoned and supportable legal conclusion. Running it by a regulator does not make it more reasoned or more supportable.

Worse, running an issue by a regulator educates the regulator to the existence of the issue and may tint the issue for the client and the

client's industry on an ongoing basis. Regulators have no incentive to opine that they do not regulate something and will frequently opt to opine in a way that is safest for them, *i.e.*, "you need a license" or "that is prohibited." Once a regulator takes a stand on an issue it becomes much more difficult to change that mindset after the fact.

In the substantial majority of situations, we advise against contacting the regulator. In the unusual situation where such contact is warranted, it should only follow full, careful legal analysis and conclusions.

So the next time you hear "Let's call the regulator," stop and consider the full ramifications. □

✧ *Darrell Dreher, Michael Tomkies, Elizabeth Anstaett and Chuck Gall*

Darrell L. Dreher
ddreher@dltlaw.com

Elizabeth L. Anstaett
eanstaett@dltlaw.com

Margaret M. Stolar
mstolar@dltlaw.com

Robin R. De Leo
robin@dreher-la.com

Susan M. Manship
smanship@dltlaw.com

2750 HUNTINGTON CENTER
41 S. HIGH STREET
COLUMBUS, OHIO 43215
TELEPHONE: (614) 628-8000 FACSIMILE: (614) 628-1600
WWW.DLTLAW.COM

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Michael C. Tomkies
mtomkies@dltlaw.com

Charles V. Gall
cgall@dltlaw.com

Judith M. Scheiderer
jscheiderer@dltlaw.com

Susan L. Ostrander
sostrander@dltlaw.com

Emily C. Barlage
ebarlage@dltlaw.com