ADMINISTRATIVE LAW Final Exam

Professor Nivala Spring 2006

INSTRUCTIONS

- This exam consists of 6 pages (including this cover sheet), and contains 2 questions totaling 200 points.
- This is a closed book exam. You may only use the rules distributed in class.
- Please write <u>legibly</u> in ink using every other line. You may use both sides of a page.
- Include your exam number on <u>each</u> bluebook.

QUESTION 1 (100 points)

The Watchdog Investment Commission (WIC) was created by the Investment Management Control Act (IMCA) to control the potential for abuse inherent in the management structure of investment management funds. These funds are managed by advisers who, in theory, act to maximize the return to fund shareholders but who may, in fact, act to enrich themselves at the shareholders' expense. Transactions with such potential are prohibited unless certain conditions are met; these conditions are known as exemption rules.

IMCA gives WIC authority to exempt such transactions. The key statutory provision reads as follows:

The Commission, by rules and regulations upon its own motion, or by order upon application, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provision or provisions of this Act or of any rule or regulation thereunder, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this Act.

IMCA also requires that when WIC "engages in rulemaking and is required to consider or determine whether an action is consistent with the public interest, it shall consider whether the action will promote efficiency, competition, and capital formation."

In January, 2004, WIC proposed to amend the exemption rules. In its Notice of Proposed Rulemaking, WIC stated the following:

We do not anticipate that these proposals will have a significant effect on efficiency, competition and capital formation with regard to funds because the costs associated with the proposals are minimal and many funds have already adopted some of the proposed practices. We request comments on whether the proposed rule amendments, if adopted, would promote efficiency, competition, and capital formation. Will the proposed amendments or their resulting costs materially affect the efficiency, competition, and capital formation of funds? Commenters are requested to provide

empirical data and other factual support for their views to the extent possible.

The most controversial proposed amendment was adopted by a 3-2 vote following the comment period and a public hearing. This proposal limited availability of the exemption rules to investment funds which have (1) a board of directors having at least 75% independent directors, and (2) an independent chair.

The WIC majority explained its position as follows:

We are all aware of recent events demonstrating abuses in the investment fund industry. Our exemption rules rely on the independent judgment and scrutiny of directors, including independent directors, in overseeing activities that are beneficial to funds and fund shareholders but that involve inherent conflicts of interest between the funds and their managers. These amendments provide for greater fund board independence and are designed to enhance the ability of fund boards to perform their important responsibilities. Increasing the percentage of independent directors will strengthen their control of the board and its directors and will help ensure that independent directors carry out their fiduciary responsibilities. In addition, a fund board is better able to protect fund interests and fulfill it own obligations under IMCA and the exemption rules when its chair does not have the conflicts of interests inherent in the role of an executive of the fund adviser.

The WIC dissent explained its position as follows:

We are concerned that these two provisions would mean a substantial cost to fund shareholders. Existing statutory and regulatory controls ensure adequate oversight by independent directors. The majority did not give any real consideration to the costs of these provisions, did not adequately justify the independent chair conditions, and did not consider available alternatives to that condition. We believe, as did many who submitted comments, that each fund should only be required to disclose whether it has an inside or independent chair. We have, in other settings, required disclosure which permits investors to make an informed. The majority ignored this precedent and those comments.

Shortly after this vote, the Widespread Coalition for Transactional Ubiquity (WCTU) filed for review on behalf of itself and its members claiming that the amendments would interfere with their current and future investment opportunities by limiting the number of funds with which they could deal if they wished to engage in exempt transactions. Within days of this filing, WIC asked for a stay of proceedings and an opportunity to supplement its record. It argued that such action was necessary to avoid postponing the September 15, 2006 date for compliance with the exemption rules amendments which, it said, were necessary to protect fund investors "in the wake of the discovery of serious wrongdoing at many of the nation's largest funds and by officials at the highest levels of those funds." WIC also noted that its chair was scheduled to resign on June 30, 2006 and stated that "prompt action could best be accomplished by having the same five commissioners who had been considering these issues bring their collective judgment and learning to bear on these issues."

After the court granted WIC's request, WIC decided that it was unnecessary to reopen the record for further comments because it had previously given notices and sought comments regarding the cost of complying with the two conditions. WIC said that "the information in the existing record, together with publicly available information on which we may rely, is a sufficient basis on which to rest our decision." Thus, after reviewing both record and other information, WIC concluded that "the amendments to the exemption rules will not have a significant adverse effect on efficiency, competition or capital formation because the costs associated with the amendments are minimal and many funds have already adopted the required amendments." The WIC majority again voted to adopt the exemption rules amendments.

The WCTU again seeks review of WIC's adoption of the exemption rules amendments. I am the United States District Court judge to whom this matter has been assigned. You are my law clerk.

ASSIGNMENT: Please prepare a memo discussing the administrative law issues raised by these facts.

QUESTION 2 (100 Points)

In February, 1994, Jorma Sibelius, a native of Finland, was charged in the state of Widener with these drug related offenses: (1) possession of cocaine; (2) possession of cocaine with intent to distribute; and (3) possession of cocaine with intent to distribute on or near school property. He applied for Widener's legislatively created Pretrial Intervention Program (PIP) where, without admitting guilt, he could, by completing the program, have the charges dismissed.

The prosecutor rejected Sibelius' application, following the state Attorney General's rule rejecting any PIP applicant charged with possession to distribute on or near school property. In 1997, the Widener Supreme Court invalidated this rule as violating the legislature's PIP purpose. In August, 1994, Sibelius pleaded guilty to the first possession charge and the prosecutor dismissed the other charges. Sibelius was sentenced to 18 months probation, a small fine, and loss of his driving privilege for six months.

In June, 1999, Sibelius filed a timely motion for post-conviction relief claiming that he had been denied effective assistance of counsel. In 1994, his attorney failed to discover that the property, which once had been a school, had been converted to a maintenance center and warehouse in 1992. Under Widener precedent, the attorney's failure would support Sibelius' assistance of counsel claim.

In March, 2000, a hearing was held on Sibelius' motion; the prosecution had not opposed the motion. The following exchange occurred:

The Court: As I understand it, the parties have been dealing with this matter for several months, the upshot of which was that Mr. Sibelius would apply to PIP and once he was placed in PIP, all matters would be dismissed and the previous conviction could be vacated.

Prosecutor: Very good, your Honor, I move for that dismissal if need be On May 21, 2000, the court entered the following order:

Upon application of the pretrial intervention Program for an order dismissing the indictments, the Court, having considered the report of the

pretrial Intervention Program concerning the defendant's participation, it is ordered that the indictments be dismissed and the clerk is hereby directed to mark the court record "Complaint dismissed – matter adjusted."

In January, 2002, Sibelius applied to have his immigration status adjusted from alien to permanent resident based on his marriage to an American citizen. On December 11, 2002, the District Director of the Immigration and Naturalization Service denied the requested adjustment relying on these two statutues:

Any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a violation of any law or regulation of a State relating to a controlled substance may not have his status adjusted.

The term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court, or, if adjudication of guilt had been withheld, where (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding or guilt, and (ii) the judge had ordered some form of punishment, penalty or restraint on the alien's liberty to be imposed.

The District Director also relied on a 2001 published opinion of the Board of Immigration Appeals holding that 'an alien is considered convicted upon the initial satisfaction of the statutory definition and he remains convicted notwithstanding a subsequent state action purporting to erase all evidence of the original determination of guilty through a rehabilitative procedure."

On June 28, 2003, the Associate Commissioner for Examinations affirmed the District Director's decision. On July 25, 2004, the Office of Administrative Appeals affirmed the Associate Commissioner's decision. Such status-adjustment eligibility decisions are not further reviewed unless the INS institutes proceedings to have the alien deported. In that case, the alien may renew his application.

On December 31, 2005, Sibelius and his wife file an action in the United States District Court for the District of Widener. I am the United States District Court judge to whom this matter has been assigned. You are my law clerk.

ASSIGNMENT: Please prepare a memo discussing the administrative law issues raised by these facts.